

NEWSPAPERS AND THE SUPREME COURT: *IN RE* CAPITAL PUNISHMENT

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INTRODUCTION

The press has long communicated news from Washington to the rest of the nation. It has acted both as a source of information and as force of political socialization in its delivery of information from the federal government to its constituents. While officials from the legislative and executive branches highly value and rely on interactions with the press, the Supreme Court largely asserts its independence from the media. This resistance is evidenced by the Court's former and current prohibitions against common journalistic practices involving the use of cameras, live-streamed audio, or live-tweeting. The Court also declines to explain or make explicit the implications of their rulings, all the while relying on the press to propagate the outcomes of its decisions.

This relative lack of initiative from the Supreme Court tilts power to Court reporters. Compared with those who represent legislative or executive policy, reporters are imbued with substantial discretion in choosing how to frame and interpret complicated Court decisions. Since the Supreme Court and the press are not as closely tied as are the press and the other two branches, nor their relationship as carefully documented, a preliminary question arises: how do the Supreme Court and the news media influence each other in terms of arguments and frames, and how has that changed through time?

This paper takes on that question within one specific subject matter. Specifically, this paper examines how the Court and media interface with and react to each other's arguments, justification, and framing of the death penalty. As the philosophical justification behind the use of capital punishment evolves, how can we describe the similarities and differences between how the Supreme Court frames issues of capital punishment and how the press portrays the same? If there are similarities or divergences, what accounts for these?

To answer these questions, this case-study analysis identifies three sets of chronologically-related and issue-related death penalty cases and compares the presence and importance of the varying Supreme Court arguments and newspaper frames. The first set of cases (1970s) concerns the

arbitrariness of certain procedures like jury instructions and trial format; the second (1980s-2000s), execution of the mentally retarded; and the third (1980s-2000s), execution of juveniles. These three issue areas are especially interesting to study since with each issue, the Court has reversed its past decision(s). The possible outcomes of the analyses are described by four hypotheses. It is important to note that multiple hypotheses may be true, depending on which issue areas are examined, and the frame in question.

Hypotheses

- 1.) The Supreme Court leads and defines the arguments on death penalty issues. Media coverage of death penalty cases tends to reflect arguments originating from the Court, and sometimes lags behind in the adoption of Supreme Court arguments.
- 2.) The press leads and defines the arguments on death penalty issues. Courts internalize media opinions or are otherwise guided by citizen sentiment, and not just by legal precedent and findings alone. The Supreme Court adopts certain arguments from the media.
- 3.) There is a perfect alignment between arguments and frames employed by the Supreme Court and the news media.
- 4.) There is no alignment whatsoever between arguments and frames employed by the Supreme Court and the news media.

Background History and Previous Scholarship

Three reasons compel this focus on Supreme Court capital punishment cases. First, the death penalty is a divisive, controversial issue that invariably gains much media attention. This assures that for any given death penalty case examined, there exist newspaper articles providing coverage of the decision. Second, only 39 Supreme Court cases exist concerning capital punishment, and for each of them, the Supreme Court opinions and corresponding newspaper articles can be located. Third and

most importantly, no studies have ever been done looking at the intersection of the Court and media through the lens of capital punishment.

While there exists considerable literature on the relationship between the Supreme Court and public opinion, as well as between the press and public opinion, relatively little has been researched on the interaction between the Supreme Court and the press. There is a certain intrigue to studying why this is the case, especially since the media almost has free reign in framing Court decisions. This freedom to interpret comes from what media scholars have diagnosed as a bottleneck effect in what the Court can communicate to the public. Since Court decisions are often very lengthy and complex, the public prefers to rely on simplified interpretations from journalists.

In addition to this curious feature of the relationship between the Supreme Court and media, what research has been done on the dynamic has been both (1) unilateral, in the direction of the Supreme Court's influence on the press, and (2) virtually nonexistent when it comes to focused analysis of capital punishment cases. This vacuum suggests that the conclusions of the present research not only will prove interesting in and of themselves but will also add to an area lacking in scholarship. Through its focus on the bilateral nature of interaction and influence between the Supreme Court and news media, this paper amends some holes in social science research left by earlier surveys on the subject.

In reading about how the media covers the Supreme Court, one is constantly reminded of a famous parallel relationship in mythology: that of the Minotaur in the labyrinth and the Athenian citizens he terrorized. In the case of the Court and newsprint media, the Court is the Minotaur, a demi-god resistant to change, and the media, a relatively agentless and naive group of youths charged to navigate the confusion of its labyrinthine ways. Neither party seems to be entirely satisfied with the other; the Supreme Court has historically bemoaned the lack of quality journalists covering its beat, and the journalists themselves find constraints in discerning what responsibilities they themselves bear as the interpreters of the Court. The comparisons end there, for the Supreme Court is unlikely to meet upon its Theseus any time soon.

Additionally, there seems to exist a greater potential for reporter framing in the coverage of Court cases than in coverage of politics. Compare the reclusive nature of the Justices to the extents that some politicians go to in order to control their publicity trails. For the most part, Supreme Court Justices attempt to minimize their interactions with court reporters and avoid publicity, hoping to train more attention to the case dockets at hand. This distancing behavior may attribute to what some view as the press' advantage in being able to frame public discussion on the Court's cases. As Michael E. Slotnik notes, "the press becomes almost as important as the events themselves in the formulation of perceived reality" (1991, 128). Slotnik also points out a parallel in the actual academic work done on media and the Supreme Court: "To the extent that such studies [on media coverage of governmental institutions] exist, the major focus has been on Congress and the presidency, with special attention placed on the presidential nomination and election process" (141).

Of the observations made about the Supreme Court and the public at large, most have centered on how the Court impacts its citizens and evokes policy responses from politicians, and not on the direct link from the Court to the press. Jeffery Mondak's findings shed a rare light on the source of the Court's power. Mondak's research (1984) indicates that the Supreme Court's power derives from its institutional legitimacy and that while media portrayals of the Court may impact that perception, the deep-seated reverence of the Court enables lends the institution its credibility.

Perhaps one of the reasons that little research exists on the dyad of the Supreme Court and newsprint is that it is hard to measure precisely what kind of linguistic and attitudinal differences lie in the Justices' opinions and newspaper portrayal of the same. Consequently, much of the research gathered on the salience of Supreme Court verdicts has neglected the role that newspapers play in favor of focusing on public opinion alone. For example, Hoekstra (2000) focuses on the interplay of the Supreme Court and a local public, using newspaper articles as a measure of availability of information. Hoekstra's focus is not so much the media's role in reframing and interpreting the Supreme Court decisions as it is using the media as a metric of public opinion. In order to establish a methodology

appropriate for measuring those elusive linguistic and attitudinal differences, this study turned to related research done on the Supreme Court.

Two main methods of inquiry stand out. On one hand, Mondak's coding methodology sheds light on relevant criteria of assessment (1984). Mondak coded certain articles based on the information presented: Did the information reveal the strength of decision i.e. 9-0 or 5-4? Did the article mention precedent or evoke the constitution? Did the article allude to community response and peer criticism?

Spill and Oxley (2003), on the other hand, focus on whether the increased politicization of Supreme Court coverage in media is better explained by differences in medium (TV or newsprint) or the kind of reporter (courtroom regulars or not). They do so by researching all news coverage they could find in Lexis-Nexis on two cases within a set time period and coding each sentence if it contained "politicized language" or demonstrated a "legalistic" mindset—variables that are softer and qualitative in nature. This utilization of Lexis-Nexis for its news content has similarly been employed by Noam Chomsky and Edward Herman in their discussion of the propaganda model, especially in their use of word searches throughout various news sources to isolate what kind of politically-charged language is used in which context (2002, xxiii). This paper owes much to the methodology employed by Spill and Oxley, as it similarly attempts to identify the presence of and measure the importance of qualitative variables within news articles.

Why Capital Punishment?

Mondak's general observations about the salience of issues (that there exists an inverse relationship between prominence and perceived policy legitimacy of court decisions in the case that the personal view is contrary to the ruling) make capital punishment especially intriguing. Punishment is a concept that is widely understood by most newspaper audiences, and the death penalty is especially salient (Yanus 2009). Practically speaking, there are only 39 Supreme Court cases related to capital punishment, making it easy to choose case studies. Additionally, there has been no previous research I

could find that investigated the question of Court and Media relations with the specific lens of capital punishment.

My research examines the changes in death penalty jurisprudence and its implementation from the 1970s to the present. The death penalty has been a mode of punishment since the foundation of the American legal system, and its implementation was largely left to the states until the 1970s. From 1967 to 1976, the death penalty was subject to a brief moratorium, on the brink of being abolished, and then reapproved. It was affirmed as a valid form of punishment for the mentally retarded and juveniles in 1989, but then abolished for those two groups of people in 2002 and 2005 respectively. These dramatic changes indicate that the national consensus surrounding issues of the death penalty changed, and changed quickly. (To put this into perspective, of the 39 death penalty cases decided by the Supreme Court, only 5 cases came before the 1971 *McGautha* case, the rest ensuing in the following forty year period.)

METHODOLOGY AND RESEARCH DESIGN

I used a case-study approach to evaluate the framing and language used by Justices and media in cases that involve capital punishment. Since I am interested in change over time in the use of framing and rhetoric, and because there are a total of 39 capital punishment cases over the span of about a century and a half, a case-study approach is most appropriate for modeling change. Change modeled demonstrates the alignment and misalignment between the Justices' perceptions, justifications, and framing of capital punishment and the media's appraisal of the same.

To this end, I performed a content-analysis of newspaper articles as well as of the majority and dissenting opinions of the same to study change in language and framing over time. I relied on academic and philosophical publications to guide me on what specific discursive patterns match with what philosophical justifications of punishment.

In order to demonstrate shifts in opinion and justifications, both on the side of the Court and also in that of the news media, I selected sets of cases that complement each other in subject matter but differ greatly in their rulings. Set 1 is comprised of the chronologically-proximate cases of *McGautha v. California* (1971), *Furman v. Georgia* (1972), and *Gregg v. Georgia* (1976). Each case is related in theme to the one preceding it. What is remarkable about this set of cases is that, in the span of six years, the Court seems to have greatly vacillated in applying the cruel and unusual standard to the death penalty—this is very evident in the drastically different findings of the three cases. *McGautha* found in 1971 that the death penalty could be prescribed by juries without the existence of national standards (the case is commonly read as basically affirming the death penalty); yet *Furman*, decided only one year later, effectively rendered the death penalty statutes of the vast majority of states unconstitutional on the basis of its arbitrary application. *Gregg* represented the response from several state legislatures that hoped to reinstate their death penalty statutes in the wake of the *Furman* ruling.

Set 2 is composed of *Penry v. Lynaugh* (1989) and *Atkins v. Virginia* (2002), two cases that investigated the constitutionality of executing convicted criminals who were deemed mentally retarded.

In *Penry*, the Court permitted the practice, but it reversed its own decision in *Atkins* only thirteen years later when it found that a substantial amount of objective indicia had demonstrated in both popular and legislative opinion that the public considered the practice cruel and unusual.

Set 3 is composed of *Stanford v. Kentucky* (1989) and *Roper v. Simmons* (2005). Set 3 also illustrates a dramatic reversal in the Court's ruling on the application of the death penalty, specifically as applied to minors. In *Stanford*, the Court found the practice permissible, but reversed that decision in *Roper* just sixteen years later.

Data Collection and Methods

Determining the Argument or Frame

For each case, I coded and analyzed the narrative of the general theme of the Supreme Court opinion. Additionally, I applied the same analysis to the relevant newspaper articles, quantifying the proportion of all news stories for one case in terms of whether they fell into one category of justification/framing or multiple categories. Each newspaper article could be recorded to have up to three frames, each of which will be ranked by their relative importance. Each Supreme Court case could have up to three arguments.

I have identified eight frames/arguments relevant to the death penalty. They are derived as much from literature on the subject of punishment as they are from observations of the Supreme Court opinions themselves. Three justifications, or “general justifying aims,” of punishment (retribution, rehabilitation, and utilitarian calculations) stand out as the most robust and most moral in nature in both the literature and Court opinions (Hart 1968, 5). Yet, as Feinberg demonstrates, Hart's three justifications are by no means mutually exclusive, which is why the coding methodology allows for each newspaper article or Supreme Court opinion to be coded for up to three separate frames or arguments.

The relevant eight frames and arguments are *deterrence*, *retribution*, *cost*, *rehabilitation*, *caprice/bias*, *procedural deficiencies*, *international trends*, and *historical practice*. Brief descriptions of each frame, and the concepts associated with that frame are provided below.

Deterrence. This utilitarian argument claims that crime can be disincentivized or prevented if the consequences for committing the crime are sufficiently harsh or undesirable. The deterrence argument can be split into two kinds, that of specific deterrence and general deterrence. Specific deterrence refers to incapacitating a criminal so that he cannot repeat the same crime again, e.g., killing the criminal so that he cannot harm more people, or confining him within prison so he does not appear in public. General deterrence refers to using punishment to prevent criminal behavior in the general populace, e.g., imposing a fine or prison sentence on assault so that people will be less inclined to commit the crime for fear of the consequences.

Retribution. The retributive approach to punishment rests in the belief that if a certain crime is committed, then a certain kind of punishment must be meted out. It is the most complex frame discussed, since it encapsulates discussions of justice, proportionality, moral reprehensibility, moral culpability, and mercy. Under this frame, a crime that is committed must be met with just and corresponding punishment. Retributive framing is also sometimes used to express the view that the victim's family members have a right to inflict punishment on the criminal. In a society with both penalties (fines) and punishments (hard labor or corporal punishment), we still choose to implement punishment because it carries with it an "expressive notion of resentment and indignation" (Feinberg 1980, 23-6). Capital punishment, the most extreme version of corporal punishment, is the most adamant way society can demonstrate the symbolic significance of some crimes that simply cannot be tolerated.

Cost. Like the retributive argument, the cost argument is also a utilitarian argument, but it departs from the retributive argument in its simplicity. The argument discusses the financial and social costs of implementing penal policy. Some death penalty abolitionists use this frame to supplement

other arguments by saying that it is cheaper to sentence a criminal to life imprisonment than to execute him, due to the costs associated with appeal suits and execution procedures. The cost frame has been invoked by Justices in their defense of maintaining the status quo in death penalty policy, since the required costs in amending statutes and revamping the criminal justice system may cost too much compared to the marginal benefits gained.

Rehabilitation. The rehabilitative frame appeals to the idea of mitigating circumstances (and therefore may be linked to the retributive frame) and the possibility of reintegrating the offending criminal back into society. The frame assumes that there can be external influences acting on an individual that either makes the person involuntarily commit a crime, or more easily conditioned out of repeating the offending behavior. Proponents of using punishment for rehabilitation argue that, given the presence of mitigating factors (age, lack of faculties) should actually be rehabilitative—offenders should be targeted for reintegration and recovery, not punitive expressions of societal mores.

Caprice/bias. Since the 1960's, opponents of capital punishment have pointed to the race-conscious and class-based applications of the death penalty as critical evidence of its unfairness. They invoke the caprice/bias argument and point to human error and jury biases that create punishment schemes that routinely sentence more minorities, whether in race, education level or in socioeconomic status. A report cited in *Gregg v. Georgia* that investigates this argument, "The President's Commission on Law Enforcement and the Administration of Justice," keenly describes the claims of the caprice/bias frame: "Finally, there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed, and carried out on the poor, the Negro, and the members of unpopular groups" (428 U.S. 153). Equity is a large part of this critique of the death penalty: should we engage in the use of capital punishment if it disproportionately penalizes one section of society?

Procedural deficiencies. This frame approaches capital punishment from a structural perspective: it interrogates whether the existing judicial structures interact in such a way that allows for systematic

discrimination against a group of people. This frame is similar to the caprice/bias frame but departs significantly from it in that the origin of procedural deficiencies lies in the domain of the court system and the statutory documents that construct it, whereas the perpetrators of caprice/bias are individual actors (district attorneys, juries, litigators, etc.).

International trends. A relatively new frame is that of comparing capital punishment policies of the United States with those of its peers for a normative comparison of death penalty policies. Reliance on or reference to foreign laws in determining domestic policy has been a contentious issue for the Supreme Court.

Historical practice. Originalist interpreters of the Constitution sometimes invoke this frame to argue that the death penalty was explicitly acknowledged in our Constitution, and further, that the death penalty was a common form of punishment in the Framers' days, thus making the punishment neither cruel nor unusual.

Supreme Court Opinions

After a thorough review of each pertinent Supreme Court decision, including assessments of both the majority and the dissenting opinions, arguments of capital punishment were identified and then ranked by strength. For example, a case in which several Justices discuss the implications of the arbitrary or capricious rendering of sentences in their opinions would be marked as employing the caprice/bias argument. A case in which a number of opinions devote significant time to the questionable ability of the death sentence to serve as a deterrent mechanism would be categorized as using a deterrence argument. While there is a degree of subjectivity in the assignment of arguments, replicability in future assignment of arguments of the cases is ensured by the descriptions and examples of each argument in the definitions provided.

Article Analyses

Relevant news articles were identified using ProQuest's newspaper archives. For each article, two inputs were selected: the case name and the phrase "Supreme Court." An explanation for the search criteria is enumerated below.¹ For each case, I searched the same 12 ProQuest historical Newspaper Databases,² each of which more or less spans the time periods of the cases selected for study. Only relevant articles were selected for inclusion. Articles were considered relevant when they devote at least 50% of the word count to the case at hand (this is to exclude analysis of Supreme Court hearing overview articles, which tend to be short and cover all of the cases the Court has granted certiorari to, or has decided without specific discussion of the case in question).

After identifying three frames for each article analyzed, the presence of other factors are recorded.

- Date of publication
- Headline
- Publishing organization (e.g., *New York Times*, *Baltimore Sun*, etc.)
- Breakdown of decision
- Direct quotes from majority Justices

¹ The vast majority of Capital Punishment cases that reach the Supreme Court arise out of

² ProQuest Historical Newspapers: Atlanta Daily World (1931-2003); ProQuest Historical Newspapers: Baltimore Sun, The (1837-1987); ProQuest Historical Newspapers: Chicago Tribune (1849-1989); ProQuest Historical Newspapers: The Atlanta Constitution (1868-1945); ProQuest Historical Newspapers: Atlanta Daily World (1931-2003); ProQuest Historical Newspapers: Baltimore Sun, The (1837-1987); ProQuest Historical Newspapers: Chicago Tribune (1849-1989); ProQuest Historical Newspapers: The Guardian (1821-2003) and The Observer (1791-2003); ProQuest Historical Newspapers: Los Angeles Sentinel (1934-2005); ProQuest Historical Newspapers: The Wall Street Journal (1889-1995); ProQuest Historical Newspapers: The New York Times (1851-2009); ProQuest: The Wall Street Journal (1984-current).

- Direct quotes from dissenting Justices
- Court-focused? (fixates on predicting or analyzing voting patterns of Justices instead of legal question at stake)
- Case-fact focused? (focuses on distinguishing case facts and case itself from other cases, with less focus on Justices)
- Editorializing?
- Mitigating background story of defendants?
- Description of crime committed?
- Mention of amicus curiae?
- Invokes phrase “cruel and unusual”?
- Invokes phrase “evolving standards”?³
- Discusses implications of decision on current death row population or statutes?
- Citation of previously-decided cases?

While the additional factors enumerated are self-evident, it may be less clear to the reader how frames are allocated and assigned in terms of rankings. Appendix A provides a coded example of a newspaper article reporting on the *Furman* decision that not only identifies the additional factors above, but also the relative strengths of the frames in the article.

³ Many articles cite the “evolving standards” of society as a means of justifying the abolition of the death penalty. I do not consider this as a frame because it is a blanket statement that derives its real explanatory power from one of the other frames I have enumerated. For example, if a journalist cites evolving standards as the reason that citizens in X state turn down juvenile executions, the real power of the shift actually derives from, for example, the arbitrary nature of the practice, the chance of rehabilitation for young people, or of the unknowable truth of innocence. The evolving standards frame may embody any one of these more nuanced explanations, but on its own, indicates nothing more than a change in how we view punishment. It is therefore not a very useful or explanatory frame, and for that reason, has been excluded from my analysis.

EMPIRICAL FINDINGS

Set 1: Unlimited Discretion of Jury, Procedural Fairness of Death Penalty Sentencing:

McGautha v. California (1971), *Furman v. Georgia* (1972), and *Gregg v. Georgia* (1976)

McGautha v. California (1971)

Case background

McGautha v. California was decided in the Supreme Court in 1971. Prior to this case, only five other capital punishment cases had been decided by the Supreme Court. Two issues concerning the death penalty were decided in the *McGautha* case. The Court ruled first that the death penalty could be prescribed by a jury, without the jury's being given standards to govern its imposition, and second, that deciding capital punishment cases through single unitary proceedings was constitutional.

McGautha v. California (402 U. S. 210) combined cases from petitioners McGautha (California) and Crampton (Ohio). McGautha was found guilty of murder in a bifurcated trial in California, where two juries separately determined his guilt and then the sentence to affix to that guilt. Crampton was found guilty of murder in a single unitary trial in Ohio, one where guilt and sentencing was determined together and by the same jury.

Both petitioners argued that their standards governing their trials violated the Due Process Clause. McGautha argued that there was no due process of law in allowing the jury to impose the death penalty without any governing standards, claiming that the jury instructions for his trial was insufficient to fulfill the Due Process Clause. The Californian judicial system, he claimed, deprived him of the Due Process protection found in Article 1 of the Fourteenth Amendment ("Nor shall any state deprive any person of life, liberty, or property, without due process of law...").

Crampton's case was considerably different. Whereas McGautha took issue with the jury instructions, Crampton argued that Ohio's single unitary procedures put two of his Constitutionally-protected rights into irresolvable tension: the right against self-incrimination guaranteed by the Fifth, and the Due Protection protection rights from the Fourteenth. In single unitary trials, unlike bifurcated

trials (such as the one that McGautha had), guilt and sentencing is determined in one trial. This essentially means that after a jury returns a verdict on guilt, the same jury decides the sentence.

Crampton argued that in order to effectively plead not guilty during the guilt-finding phase (where he would have to speak on his own behalf) he would compromise his 5th Amendment right against self-incrimination in the sentencing phase. In practice, his argument could be seen as: If I claim that I am innocent, but am nonetheless found guilty, then the same jury who is already convinced that I am guilty, now also may think me dishonest and a perjurer in my attempt to establish myself as not-guilty. This would undoubtedly prejudice them in their application of my sentence, especially when the standards jury instructions on death penalty cases are so sparse.

The majority Justices (Harlan, Burger, Stewart, White, Blackmun, Black) found “no constitutional infirmity in the conviction of either petition, and affirm[ed]” the lower court rulings in for both McGautha and Crampton.

To rebut McGautha’s claim that standardless-jury discretion in death penalty cases, the Court argued that it was not only impossible to enumerate the standards and factors of considerations to present to a jury for capital sentencing, but that for governments to do so would actually be deleterious for punished. “For a court to attempt to catalog the appropriate factors in this elusive area could inhibit, rather than expand, the scope of consideration, for no list of circumstances would ever be complete.”

The Justices spent more time to address Crampton’s claim. They stated: “We do not think that Ohio was required to provide an opportunity for petitioner to speak to the jury free from any adverse consequences on the issue of guilt.” In other words, unitary trials, which use one jury to assign both guilt and sentencing, do not violate the Due Process Clause of the Fourteenth Amendment.

The Justices referred to time-honored traditions concerning those accused of capital crimes to justify their decision. In this case, the Justices argued, it is not a violation of the Fifth Amendment right against self-incrimination to compel a defendant to be cross-examined since they themselves chose to

testify, and therefore open up the grounds for their cross-examination. They point to historical legal traditions that also legitimize this tension in order to justify its continued practice. This same logic (if a defendant gains a privilege commonly associated with possible costs, he cannot simply avoid the cost), when applied to the issue of bifurcated trial, elicited a similar conclusion. If the defendant decides to speak on the issue of guilt at a unitary trial, he incurs a risk of leaving an unfavorable impression for sentencing; however, this does not make the entire sentencing system unconstitutional. Thus, “We conclude that the policies of the privilege against compelled self-incrimination are not offended when a defendant in a capital case yields to the press to testify on the issue of punishment at the risk of damaging his case on guilt.”

Arguments in *McGautha* Supreme Court opinions

What is striking about this decision is that the majority Justices acknowledged that, while the bifurcated jury-trial may be the fairest, the unitary jury-trial is nonetheless constitutional. Furthermore, the Court hardly considered cases involving capital punishment distinguishable from other forms of punishment. Furthermore, they also left notable discretion to the jury in “reflect[ing] ‘the evolving standards of decency that mark the progress of a maturing society,’ ” a discretion that they would come to severely challenge only a year later in *Furman v. Georgia*.

Because of these particular arguments, the three main arguments of punishment exhibited in *McGautha v. California* concern those of procedural deficiencies, cost, and retribution.

Procedural Deficiencies. The strongest argument in *McGautha* concerns the procedural deficiencies that Crampton and McGautha claim are so inherently unfair. The Justices seemed to indicate that there were no such procedural deficiencies. The Justices never stated this directly, but one can easily identify this frame from the Justices’ seeming indifference towards granting defendants the fairest possible trial. This can be inferred from two premises offered by the Court: that a defendant must choose and bear the consequences of his defense strategy, and that, while a bifurcated trial may be fairest, it is not a right

of the punished to obtain the most fair trial. All that due process requires is that a defendant gets access to a constitutional trial; even if a fairer type of trial exists, the Constitution does not compel its use.

To say that the two-stage jury trial in the English-Connecticut style [i.e., the bifurcated trial] is probably the fairest, as some commentators and courts have suggested, and with which we might well agree were the matter before us in a legislative or rulemaking context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment.

To defend this point of view, the Court pointed to other long-standing courtroom traditions concerning due process. The Court distinguished Crampton's claim from the case of *United States v. Simmons*, where the Court ruled that using testimony elicited in unsuccessful pretrial motions (possible testimony that disadvantages the defendant) would be unlawful because this created "an intolerable tension between constitutional rights"—the Fifth Amendment right against self-incrimination, and the Fourth Amendment right to contest and fight back against unlawful search and seizures. The Court, however, distinguished the *Simmons* case from Crampton's because the right to a bifurcated trial is not something guaranteed by the Fourteenth Amendment, and so there is no tension between a Fifth Amendment right against self-incrimination and the implementation of a unitary trial.

Additionally, the majority Justices cited analogous common criminal practices: defendants who testify on their own behalf generally waive their rights against being cross-examined (since they have presumably weighed the benefits of testifying and being cross-examined before deciding to testify). They argued that this tension (the defendant must carefully weigh his defense strategy, lest he loses one protection in the pursuit of another privilege) has not been considered cruel: "It is not thought overly harsh in such situations to require that the determination whether to waive privilege take into account the matters which may be brought out on cross-examination. It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like." Further language used by the Justices indicates that those procedural measures are indeed "harsh" but not "overly harsh": "It is not thought overly harsh in such situations to require that the determination whether to waive privilege take into account the matters which may be brought out on

cross-examination. It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like.” The Justices seemed to reason that, being a defendant in a case entailing capital punishment, all that the defendant deserves is a trial that does not violate constitutional provisions; he does not deserve anything that would be definitively better for him than the lowest qualifying kind of Due Process.

Cost. The Court’s decision was also practical in considering economic repercussions, because the second-most prominent argument that the majority offers to justify not recommending an overhaul of nationwide standard-less death penalties is based on a cost argument. The Court stated:

With recidivism the major problem that it is, substantial changes in trial procedure in countless local courts around the country would be required were this Court to sustain the contentions made by these petitioners. This we are unwilling to do. To take such a step would be quite beyond the pale of this Court’s proper function in our federal system.

In addition to their earlier admission (bifurcated trials are fairer for defendants), the Court gave weight to utilitarian considerations in the sense that the cost of revamping the criminal justice laws across the nation would be less desirable than keeping the current system of standard-less jury.

Retribution. There are two specific ways that the majority opinion considered punishment as a form of retribution. Both are found within a discussion of using jury discretion to administer the death penalty. First, the Justices wrote of the necessity of using community judgment (jury determinations of punishment) to establish links between the judicial system and community members at large:

One of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect “the evolving standards of decency that mark the progress of a maturing society.”

The idea of retribution was introduced in its counterpart, “mercy.” The Court cited an older opinion from *Skinner v. Oklahoma*, which claimed that the original purpose of jury trials was to provide for mercy in punishment. The Court denied that the current state of finding punishment has strayed from it, and even wrote that “in light of history, experience, and the present limitations of human

knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.”

Additional notes

It is especially important to note that the Court made no distinction between capital punishment and any other kinds of punishment. (“Nor does the fact that capital, as opposed to any other, sentencing is in issue seem to us to distinguish this case.”) This lack of distinction, while not neatly confined to any one frame of punishment, will be retired in future discussion.

TABLE 1

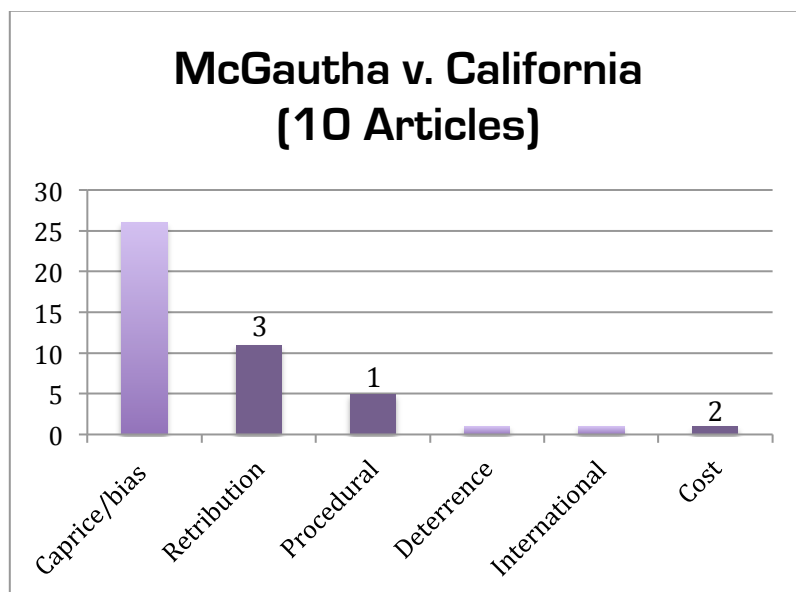
McGautha v. California (1971)⁴

Vote: 5 – 4

Decision: It is not unconstitutional to institute the death penalty without giving governing instructions to the jury.

Frames from Court opinion:

1. Procedural Deficiencies
2. Cost
3. Retribution



⁴ See Appendix B for an explanation of the Tables included in this paper.

Furman v. Georgia: (1972)

Case background

The *Furman* decision (408 U. S. 417) combined the petitions of three convicted criminals: Furman, convicted of murdering the father of five children after breaking into the victim's home, and two others convicted of rape during the course of robbery. With a 5-4 vote breakdown that reversed the sentence in all three cases, and with each member of the Court writing his own opinion, the *Furman* decision has been inducted into the Supreme Court hall of fame as one of the most divisive and extensively argued cases in its history, and for years after, one of the longest opinions ever rendered. The decision also had the effect of nullifying the capital punishment statutes of thirty-nine states (those that permitted the death penalty) as well as relevant provisions of the Criminal Code of the United States and of the Uniform Code of Military Justice. For four years after the *Furman* decision, states held off on executions until *Gregg v. Georgia* was granted certiorari upon the Court's evaluations of the reformed criminal justice statutes of some of the states impacted.

In *Furman*, the Court granted certiorari to determine whether the application of the death penalty in those three cases constituted cruel and unusual punishment. The majority found that the death penalty in the three cases at hand violated the Eighth Amendment prohibition against cruel and unusual punishment. The reasons for their findings were far from uniform, however (recall the plurality of opinions for this case).

Five Justices concurred in the majority ruling, which reversed the lower courts' decisions (Douglas, White, Brennan, Stewart, Marshall). In doing so, they cited the argument from arbitrary application, lack of a credible deterrent effect, and the racial and economic inequalities embodied in the criminal justice system. The concurring opinions also relied heavily on the standards created in *Trop v. Dulles*, the landmark case in which the Court found that the penalty of expatriation for the capital offense of desertion during wartime was cruel and unusual. *Trop* established the standard that the cruel

and unusual punishment clause was tied to “evolving standards of decency that mark the progress of a maturing society,” which the Court uses in this case to justify the reversal of the lower courts’ decisions.

Dissenters (Blackmun, Rehnquist, Powell, Burger), barring personal objections the practice, opined that the sporadic nature of a jury’s death sentence recommendation indicated that due deliberation and consideration is consistently given to whether the punishment is cruel and unusual, and that abolitionists of the death penalty have not conclusively proved that there is no deterrence effect to the practice. The dissenting Justices rely on using historical context of the Framers’ era to illustrate the capital punishment was expressly allowed by the Constitution, and should continue to exist. Additionally, the dissenting Justices point to the *McGautha* decision, rendered only one year earlier, to point out what they believe is a demonstration of inconsistent ruling and lack of judicial restraint on the part of the majority. In his dissent, Chief Justice Burger wrote that “it would be disingenuous to suggest that today’s ruling has done anything else than overrule *McGautha* in the guise of an Eighth Amendment adjudication.” He especially refuted the claims made by his concurring colleagues, saying that “the five opinions . . . share a willingness to make sweeping factual assertions, unsupported by empirical data” especially as they concern the prevalence of caprice/bias in actual executions and also the efficacy of deterrence.

Arguments in *Furman* Supreme Court opinions

The strongest frames in *Furman* are those of caprice/bias, deterrence, and retribution, with the potency of their prevalence.

Caprice/bias. Although Justices Brennan and Marshall stated their outright rejection of the death penalty as a practice, the other three concurring Justices did not go as far in their opinions. Their objections to the death penalty were on the grounds of the arbitrariness of its application, based on considerations of race and socioeconomic status. This determination to eliminate the elements of caprice and bias from executions can be found in the opinion of Justice Douglass, who believed that

the “cruel and unusual” standard of the Eighth Amendment required legislatures to write laws that are “evenhanded, nonselective, and non-arbitrary.” The vice in applying a penalty, he said, lay not so much in the punishment, but in the irregularity of its application: being poor, black, young, and ignorant are all factors that predispose one to execution.

Indeed, Justice Brennan’s strongest objection to the death penalty was also on the grounds of its arbitrary application. He scathingly wrote: “When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.” Also commenting on the arbitrariness of exacting the penalty, Justice White famously wrote:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.

Interestingly, the dissenting opinions are relatively quiet on this issue.

Deterrence. The frame of deterrence is hotly debated in both the concurring and the dissenting opinions. Deterrence was discussed both in its specific effects (as it prevented the same criminal from repeating the crime) and for its general effects (disincentivizing the population at large from committing a capital offense). Those in the majority tended to talk about the lack of credible deterrence in imposition of the death penalty; not everyone considered crimes rationally, no empirical evidence showed there to be a deterrent effect generated by the death penalty, and the sporadic imposition of the sentence made it even more unlikely that it served as an effective deterrent. Those dissenting pointed out that there was no evidence that the death penalty had no effect, and argued that the Constitution did not mandate the use of the most effective deterrent—that is, using a less-than-absolutely effective deterrent (such as the death penalty) did not violate the Constitution. Most Justices devoted time to either bolstering the claim from deterrence (or lack thereof) but neither the dissenters nor the majority

found the deterrence argument compelling enough on its own, to support the case for maintaining or disbarring the death penalty institution outright.

Retribution. There was considerable conflicting opinion even among the concurring Justices as to what role retribution should play in punishment. Justice Stewart (and to some extent Justice Marshall) suggests that the entire purpose of punishment is to satisfy the requirements of civility and retribution, while others such as Justice Brennan dismisses retribution as reeking “naked vengeance.” Regardless of their appraisal of retribution as a frame, the Justices devoted significant time to discussing whether the death penalty could be upheld for the purpose of retribution, to an inconclusive end.

Additional notes

While the three main frames of this case are those of caprice/bias, deterrence, and retribution, Justice Marshall writes in his concurring opinion all of the frames that the Court could have entertained. They are provided here to give a sense of what frames the Court believed it could select from. They were that of retribution, deterrence (general and specific), cost, eugenics, and incentivizing guilty plea. The latter two frames he dismissed outright as being unconstitutional and cruel.

Gregg v. Georgia: (1976)

TABLE 2

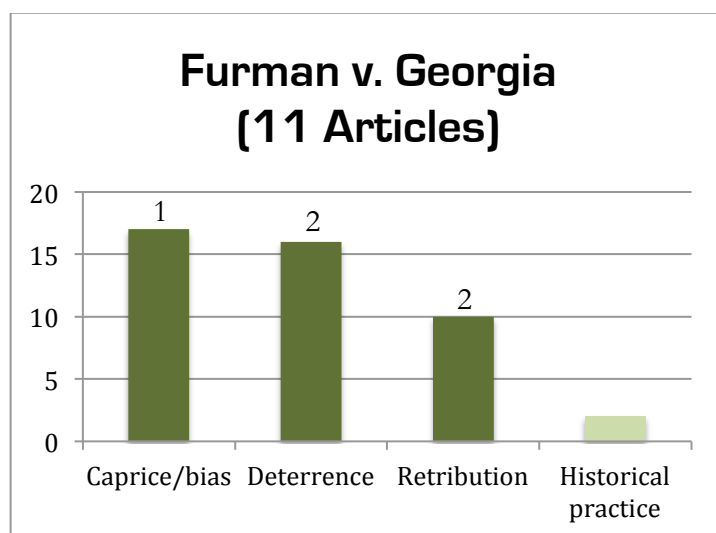
Furman v. Georgia (1972)

Vote: 5 – 4

Decision: The arbitrariness of imposition enabled by current death penalty statutes renders practice unconstitutional. (Effectively institutes moratorium on executions).

Frames from Court Opinion:

1. Caprice/bias
2. Deterrence
3. Retribution



Case background

Four years after the moratorium on all capital punishment sentences established in *Furman*, five states submitted their newly-crafted death penalties for Supreme Court review. While two Justices in the *Furman* majority found the death penalty unconstitutional, three of the Justices indicated that, if reformed to give the jury less “untrammelled discretion” and amended to bar mandatory death penalty sentencing, then the death penalty may still be implemented. These state legislatures (Oklahoma, Louisiana, North Carolina, Texas, and Georgia, from which the name of the case is derived) set out to devise sentencing guidelines to fit the narrow requirement that the Court established.

Gregg v. Georgia (428 U. S. 195) represented only one of the five new statutes submitted to the Court for consideration in the 1976 term, but the overall ruling that resulted is generally consolidated into and referred to as *Gregg*, and as such, the discussion below will focus on but will not be limited to solely the case facts of *Gregg v. Georgia*.

Georgia’s new death penalty statute featured a bifurcated trial, in which only six kinds of crimes were eligible for death penalty consideration (murder, kidnapping where the victim is harmed, armed robbery, rape, treason, airplane hijacking). Furthermore, one of ten aggravating factors (e.g. murder committed for money, murder of police officer, murder during rape, offense was outrageous or wantonly vile) had to be demonstrated in order to reach the next phase of sentencing. If and only if an aggravating factor was established can the jury weigh and recommend the death sentence. Finally, after each death sentence, an automatic appellate review was triggered, where among other things, the presiding judge had to fill out a questionnaire to evaluate whether prejudicing factors such as race played a part in sentencing procedures.

It was this with new statute that Georgia sought to impose the death penalty on Troy Gregg, a man found guilty of murdering and robbing two men with whom he had hitchhiked. Gregg alleged that he killed the two victims out of self-defense, but the jury was unconvinced. The Supreme Court, however, seemed to be convinced that Georgia’s new statute no longer contained the “fatal flaws” that

made its statute unconstitutional in 1972, upholding the Georgia statute and affirming the judgment seven to two.

Justice Stewart penned the majority opinion, joined by Chief Justice Berger and Justice Rehnquist, and decided that the fatal errors of the previous Georgian statute (that of too much jury discretion and arbitrariness in application of the death penalty) had been sufficiently addressed by the new statute. It also recognized that retribution and possibility of deterrence are the only valid considerations for a legislature to weigh for the use of the death penalty. Their decision touched on the historical use of the death penalty (and its explicit mention in the Fifth Amendment), and went on to examine Gregg's claim that allowing juries to use mercy in their deliberations would introduce undue arbitrariness into the criminal sentencing process. The Court wrote that "nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." Justice White, writing in concurrence, additionally argues that Gregg's assertion that prosecutors behave in a standard-less fashion in deciding which cases to try and which cases to offer plea bargains for is ungrounded, saying that prosecutors rely on a threshold of sufficient evidence and sufficient severity of crime to guide their prosecutorial work.

Arguments in *Gregg* Supreme Court opinions

There are four strong frames in this case, with a tie for second place. The main frame is that of caprice/bias, while deterrence and retribution come in second and desert comes in last.

Caprice/bias. It is unsurprising that the strongest frame of this case, since the states submitted statutes aimed at correcting aspects that the Court found to have been riddled by arbitrariness and untrammelled discretion of the jury. After all, the state of Georgia took this case to the Court to demonstrate just how its newly-implemented safeguards minimize undue arbitrariness, or "passion, prejudice, or any other arbitrary factor" based on race or socioeconomic status. Arguments from the caprice/bias frame constitute the bulk of the majority opinion, and also that of the concurring opinion.

After a thorough explanation and qualification of the Georgia death penalty statute, Justice Stewart wrote: “In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.” His opinion further indicates that minimizing the possibility that caprice and arbitrariness in trial procedure pronouncement of the death penalty was a necessary condition for the Court to lift the ban on a state’s ability to execute, but, depending on the particular statute in question, minimization may not have been a sufficient condition (note that the same day that *Gregg* was affirmed, the Court affirmed the death penalty statutes of Florida and Texas but rejected the statutes from North Carolina and Oklahoma).

The concurring opinion also discussed the questions raised from a consideration of arbitrary procedure: after a lengthy repudiation of the petitioner’s claims (that prosecutors behave in a standardless fashion in deciding which cases to try, that the new statute was still too vague in jury instruction), Justice White concluded that the new Georgia statutes sufficiently minimize the risk of arbitrary death penalty implementation:

Indeed, if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, [in its appellate review function after a jury-finding for death] death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside. Petitioner has wholly failed establish . . . that the Georgia Supreme Court . . . is incapable of performing its task adequately in all cases, and this Court should not assume that it did not do so.

From the above quote alone, one can see that the opinion is riddled with words associated with the caprice/bias frame, such as “wanton,” “freakish,” and “discriminatory.” The Justices in the concurring opinion, on the other hand, seemed to give the statutes the benefit of the doubt, their faith in implementation of the death penalty procedures apparently restored.

Deterrence and retribution. The two frames tied for second strongest frame are often mentioned in the same breath in *Gregg*. The majority opinion reads, “The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.” The two frames

are equally central to the majority opinion. Their strength remains tied, for deterrence is further discussed in one dissenting opinion, and retribution in that of another, with no overlap. Justice Brennan's strong dissent featured the frame of deterrence ("death is not only an unusually severe punishment...it serves no penal purpose more effectively than a less severe punishment") and remained quiet on the question of retribution. Justice Marshall's dissent strongly condemned legitimizing retribution as a justification behind capital punishment, saying, "The other principal purpose said to be served by the death penalty is retribution. . . it is this notion that I find to be the most disturbing aspect of today's unfortunate decisions."

Procedural Deficiencies. The Court revealed that it believed that convicted criminals did not deserve to be subjected to the least severe penalty possible—even if there was a less severe punishment that would serve the same penal or deterrent function. This attitude was previously adopted by the Court in *McGautha*, when the Court essentially declined to force states to use bifurcated trials even when a unitary trial sometimes was considered to be fairer. Textually, the procedural deficiencies arguments can be espied in Justice Stewart's opinion: "We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved." The Court here was more or less stating that while it recognizes that potentially less "extreme," "irrevocable," and "severe" punishments may achieve the same ends as the death penalty, but that the Court has no policy incentive or Constitutional obligation to overturn decisions made by the state legislature. The Court would later abolish the death penalty for mentally retarded criminals and juveniles alike on the grounds that the punishment is too severe for the crime, whatever it is, demonstrating that it is legally capable of forcing states to at least rule out the most "severe" penalty possible.

Additional notes

The *Gregg* decision changed the game in more ways than just lifting the ban on the death penalty. It fortified the consideration of proportionality of the punishment to the crime as a

consideration compelled by the “cruel and unusual standard.” “It is clear from the foregoing precedents [established in *Furman*, which made proportionality a controlling factor in deciding what was cruel and unusual] that the Eighth Amendment has not been regarded as a static concept.” The criteria of proportionality established in *Gregg* would eventually be applied in *Atkins* and *Roper* to abolish the penalty for mentally retarded and juvenile defendants, on the grounds that the two classes of people had diminished maturing and culpability, which made the death penalty categorically disproportionate to the crimes they committed.

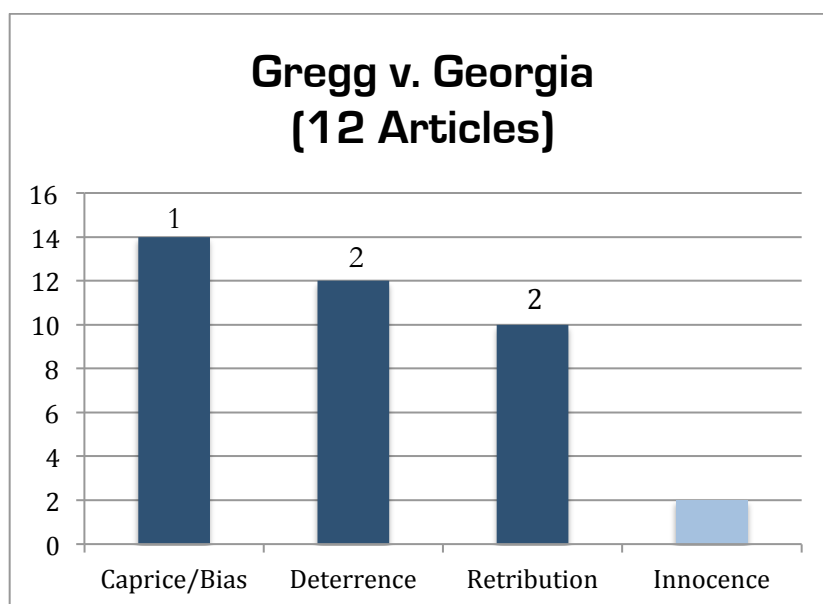
Additionally, the opinion in *Gregg* opened the door to judicial interpretations of “standards of decency” (as opposed to the Court’s deferring to legislative judgment). The majority opinion by Justice Stewart opined that “legislative measures adopted by the people’s chosen representatives weigh heavily in ascertaining contemporary standards of decency.” Whereas, prior to *Gregg*, the Court exclusively deferred to the states to create death penalty statutes, it now affirmed the its right to evaluate and interpret the existence of state statutes as objective indicia on society’s evolving standards of decency. Essentially, while the Court could not legislate against the death penalty, it could decide when they perceive a national consensus against the penalty. This judicial interpretation would be expanded after *Gregg*, with the Court relying on this interpretive power to uphold the execution of mentally retarded defendants in 1989 on the grounds that not enough legislatures had banned the practice, and eventually using it to overturn that same decision in 2002 by deciding that enough legislatures had banned it to signal a nation-wide outcry against it. For both issues, it is the Court which decides at which point there exists a national consensus.

TABLE 3*Gregg v. Georgia (1976)***Vote:** 7 - 2

Decision: The new Death Penalty statutes in question are constitutional. (Ends moratorium on executions imposed by *Furman*)

Frames from Court Opinion:

1. Caprice/bias
2. Deterrence/Retribution
3. Desert



Set 2: Execution of the Mentally Retarded: *Penry v. Lynaugh* (1989) and *Atkins v. Virginia* (2002)

Preliminary Remarks

One notable trend apparent in the next two sets of cases (Sets 2 and 3) surrounding the cases of execution of the mentally retarded and juveniles, respectively, is the interrelatedness of the issues. Besides the obvious chronological overlap of the cases (the *Penry* and *Stanford* decisions were rendered on the same day), there is additionally much cross-pollination between the issues of mental retardation and juvenile execution. One such aspect stems from the general way mental retardation is described; the use of language such as “the defendant has the mental age of a seven year old child” inevitably compares the impairments of social and intellectual development in mentally retarded persons to that of a juvenile. As far as the Supreme Court is concerned, the decision in *Penry* finds steadfast rationale in the lessened culpability argument that was developed in *Thompson v. Oklahoma*, an earlier Court case that ruled on the constitutionality of executing criminals under the age of 15. The Court’s opinions in both *Stanford* and *Penry* reference each other as precedent. Additionally, the 2002 *Atkins* decision played a very significant role in the later *Roper* decision, rendered in 2005.

Penry v. Lynaugh (1989)

Case background

The case of *Penry v. Lynaugh* involved a defendant, Johnny Paul Penry, who was sentenced to death in Texas for the 1979 rape and murder of Pamela Carpenter. Penry, twenty-two at the time, had an IQ between 50 and 63 and suffered from “mild to moderate retardation.” Penry had entered Ms. Carpenter’s home, brutally raped her, and then stabbed her with a pair of scissors, which according to his confession, was done not out of self-defense, but to prevent Ms. Carpenter from identifying him. He was found competent to stand trial in Texas, where the jury, using the jury instructions for the Texas Special issues framework (in which if they answered yes to three question on aggravating questions posed, the death penalty would be applied for the defendant), he was sentenced to death.

Penry appealed, arguing two things: 1.) that Texas’s strict sentencing framework for capital crimes prevented the jury from considering the mitigating factors of his mental condition, and from expressing its “reasoned moral response” to that evidence in rendering its sentencing decision; 2.) that it is categorically cruel and unusual to impose the death penalty on mentally retarded defendants. The Court, in a unanimous opinion penned by Justice O’Connor (with three additional opinions concurring in part and dissenting in part), accepted his arguments on the first count, but refused to accept a holistic prohibition on executions for mentally retarded.

It is important to note that the Texas statute in question was one of the first death penalty statutes approved (on the same day as the Georgia statute in question during *Gregg*) after the moratorium imposed through *Furman* was lifted. The Texas Special Issues framework made it such that if a jury answered yes to three questions on aggravating factors (1. Whether the defendant’s conduct was committed deliberately and with the reasonable expectation that death would result; 2. Whether there was a probability that he would be a continuing threat to society; 3. Whether the killing was unreasonable in response to provocation by the victim) then the death penalty was automatically applied; if any of the questions were answered with no, then the defendant would be subjected to life

imprisonment instead. The Court found in favor of Penry in that the strict three-issue framework did not permit for the jury to act and meaningfully weigh the individual mitigating factors of the case against the aggravating factors enumerated, and therefore his case was to be retried. However, the Court did not find that mental retarded offenders were categorically exempted from the death penalty. Justice O'Connor concluded her opinion with the same kind of open-ended dismissal that concluded *Stanford*: "While a national consensus against execution of the mentally retarded may someday emerge... there is insufficient evidence of such a consensus today."

Arguments in *Penry* Supreme Court opinions

The three strongest frames in *Penry* are that of retribution, historical practice, and rehabilitation, in that order.

Retribution. Unsurprisingly, the retributive frame is the most robust frame witnessed, for much of the juridical debate in *Penry* focused on the proportionality of the crime to the punishment, especially as to whether mental retardation diminished the culpability of a defendant. "Underlying Lockett and Eddings" (two relevant cases from 1978 and 1982 respectively, referenced in *Penry* to clear up the constitutionality of the new *Gregg* statutes) "is the principle that punishment should be directly related to the personal culpability of the criminal defendant . . . defendants who commit criminal acts that are attributed to...mental problems, may be less culpable than defendants who have no such excuse" (O'Connor, citing *California v. Brown* (1987)). Furthermore, in considering the categorical ban of the use of the death penalty on mentally retarded defendants, Justice O'Connor relates in Part C of the majority opinion *Penry*'s disproportionality claim that "execution of a mentally retarded person like himself with a reasoning capacity of approximately a 7-year-old would be cruel and unusual because it is disproportionate to his degree of personal culpability."

Finally, the retributive frame is explicitly examined in Justice Brennan's dissent, in which he reiterates the *Stanford* decision "requir[ing] that a punishment further the penal goals of deterrence or

retribution.” While he only spends a paragraph addressing the former, he dedicates almost seven paragraphs discussing the shortcomings of the latter goal, decrying that the execution of those that “inevitably lack the cognitive, volitional, and moral capacity to act with the ...culpability associated with the death penalty.”

Historical Practice. The second strongest frame is the defense from the majority opinion of the historical practice of execution for those deemed to be “idiots.” Not only does the Court dismiss contemporary opinion polling as a means of gauging societal consensus against the execution of mentally retarded defendants, but it also refers to both a historical ban on the common law tradition of banning execution of “idiots” and “lunatics,” while nonetheless arguing that there should be no categorical ban on executing the mentally retarded. The Court cites Blackstone, writing in the mid 1700’s: “idiots and lunatics are not changeable for their own acts, if committed when under these incapacities...a total idiocy...excuses from the guilt, and of course from the punishment, of any criminal action.”

Yet, despite a lengthy discussion of historical practices of granting mercy to “lunatics” (the modern day “mentally ill”) and “idiots” (the modern day “mentally retarded”), the Court says that because the jury found Penry competent enough to stand trial, and presumed him to have the “ability to consult with his lawyer with a reasonable degree of rational understanding,” he was aware of the punishment he was liable to suffer, and therefore, under a precedent set in *Ford v. Wainwright* (1986), could not be excluded from capital sentencing on the grounds of mental retardation alone.

Rehabilitation. A discussion of the third strongest frame, that of rehabilitation, explains the incredible catch-22 that faced mentally retarded defendants sentenced for capital crimes under the Texas statute. Recall the second question posed by the Texas Special Issues framework: is there probability that the defendant would be a “continuing threat to society”? As the jury and the Court noted, “Penry’s mental retardation indicated that one effect of his retardation is his inability to learn from his mistakes.” His mental retardation almost automatically assures that a jury would find him less

likely to be reformed and therefore less eligible for future rehabilitation. Therefore, the Court says, “Penry’s mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future.”

Additional notes.

The desert frame and the deterrence frame were also employed in this opinion, albeit not as prominently as were the other three frames. Justice O’Connor explicitly (but briefly) discusses the deservingness of punishments by siding with Penry on the flawed nature of the Texas Special Issues framework: “a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence.” The deterrence frame was also pithily discussed in Justice O’Connor’s majority opinion and then reiterated in Justice Brennan’s dissent: both addressed retribution and deterrence as the only two purposes justifying punishment. While the retributive element received a lot of Courtly attention, discussion of the deterrence frame was left fallow by Justice O’Connor and easily dismissed by Justice Brennan (“Killing mentally retarded offenders does not measurably contribute to the goal of deterrence”).

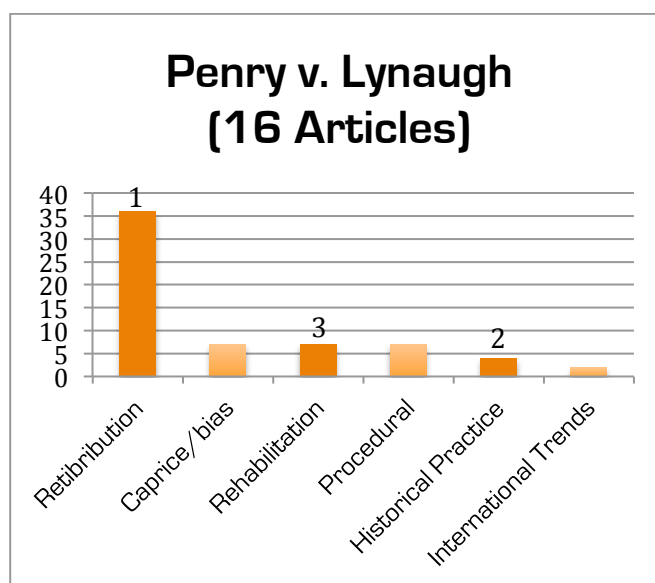
TABLE 4*Penry v. Lynaugh* (1989)

Vote: Unanimous, with 3 opinions concurring and dissenting in part

Decision: Execution of the mentally retarded is not unconstitutional; not providing jury instructions that allow for consideration of adequate mitigating factors is unconstitutional.

Frames in Court Opinion:

1. Retribution
2. Historical Practice
3. Rehabilitation

*Atkins v. Virginia* (2002)

Case background

Thirteen years after the decision in *Penry*, the Court decided to re-examine the second question posed by *Penry*: whether executions of mentally retarded persons are “cruel and unusual punishments” prohibited by the Eighth Amendment. In this case, the petitioner, Daryl Atkins, was sentenced to death in Virginia. With the help of an accomplice, Atkins abducted his victim, an airman from Langley Air Force Base, forced him to withdraw \$200 from an ATM, and despite the victim’s pleas to leave him unharmed, fatally shot the victim eight times. His accomplice, being sound of mind, offered a much more cogent and credible testimony than Atkins, who was not only found to have an IQ of 59 (making him mildly to moderately retarded), but also to have an extensive criminal history that ranged from assault, robbery, and maiming.

The majority opinion was delivered by Justice Stevens and represented six Justices; two separate dissenting opinions were penned by Justice Scalia and Chief Justice Rehnquist, with respective joinings in from the other, as well as the joining of Justice Thomas. The majority ruled that since the *Penry* decision, there has been a demonstrated shift in national consensus against the use of the death penalty on mentally retarded defendants, evidenced not only by newly-enacted state-level legislative bans but

also by the paltry number of such executions carried out since *Penry* (only five in thirteen years). The majority notes that compared to the sole legislative ban on executing mentally retarded criminals (Maryland) at the time that *Penry* was decided, there was now 18 such statutes; this, Justice Stevens writes, “provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal” and that “it is not so much the number of these States that is significant, but the consistence of the direction of change.” It is also this “consistency of the direction of change” that Justice Scalia lambasts.

Arguments in *Atkins* Supreme Court opinions

The three strongest arguments in *Atkins* are retribution, deterrence, and international trends.

Retribution. Unsurprisingly, the issues debated through the retributive frame are similar to the ones espoused in *Penry*; the difference is, however, that the *Penry* ruling is overturned. The argument from retribution espoused by the majority is that there is categorically a discrepancy in proportionality between the mentally retarded defendant’s culpability and the irrevocable punishment of death. This argument was explicitly rejected by the majority in *Penry*, but the Court somehow adopts a precedent from *Godfrey v. Georgia* (1980) which allowed the Court to judge that “if the culpability of the average murderer is insufficient to justify the most extreme sanction available to the state, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.” Since the majority opinion in *Atkins* essentially negated the retributive reasoning it found inadequate in *Penry*, not much discussion will be devoted to a rehashing of the frame.

Deterrence. Again, the frame of deterrence, as it applies to mentally retarded criminals, has been discussed in *Penry*, but echoed again in *Atkins*. It is ranked as the second strongest because it was both the second strongest frame in the majority opinion, but also the only other frame evoked in the majority opinion as well as in another dissenting opinion.

Together with retribution, deterrence constitutes one of the two pillars of the justification behind any instance of government-sanctioned punishment. The majority argued that because of the diminished mental capabilities of mentally retarded persons, the deterrence effect could not be said to be a valid justification of the death penalty for that class of people:

The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

Justice Scalia dismissed this view (with little factual or statistical evidence) by saying that since it was unlikely that no mentally retarded people at all were deterred by the penalty, then surely the deterrent effect of a penalty is “adequately vindicated.”

International Trends. The international trends frame is the third strongest, because while it was not mentioned at all in the majority opinion, it was prominently featured in both the dissenting opinions. Both Justice Scalia and Chief Justice Rehnquist’s dissenting opinions find great fault in what they perceive as “the Court’s decision to place weight on foreign laws...in reaching its conclusion” (the European Union submitted an amicus brief in favor of abolishing the practice, in part summarizing the prohibitions from many of its constituent nations). Justice Scalia is more vocal in his denunciation of the Court’s consideration of international standards on the practice, writing, “irrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people.”

Additional notes

The vehicle through which the Court has been able to limit the death penalty since the 1970’s has not been through a shift in Court sentiment about the penalty, but in fact, through the Court’s redefinition of what constitutes the “objective indicia” that indicate an evolving national consensus. Recall that it was not until *Gregg* in 1976 that the Court looked to state statutes as indicia of national

consensus; it is in *Atkins* that the infrequency of executions of X class of people tentatively becomes another such indicia. As one can imagine, the establishment of frequency of use as an indicia was a controversial issue among the Justices, hence why a significant part of the majority opinion is devoted to explaining and contextualizing the reading of such a consensus and why Justice Scalia's dissent is primarily focused on rebutting such a reading of indicia ("Given that 14 years ago *all* the death penalty statutes included the mentally retarded, *any* change was *bound to be* in the one direction the Court finds significant enough to overcome the lack of real consensus.") As such, this case concentrated as much on justifying punishments as well as on the technical ways through which the Court interprets and acts upon the consensus surrounding the punishments, making the frames not quite as focal in the overall Court decision.

TABLE 5

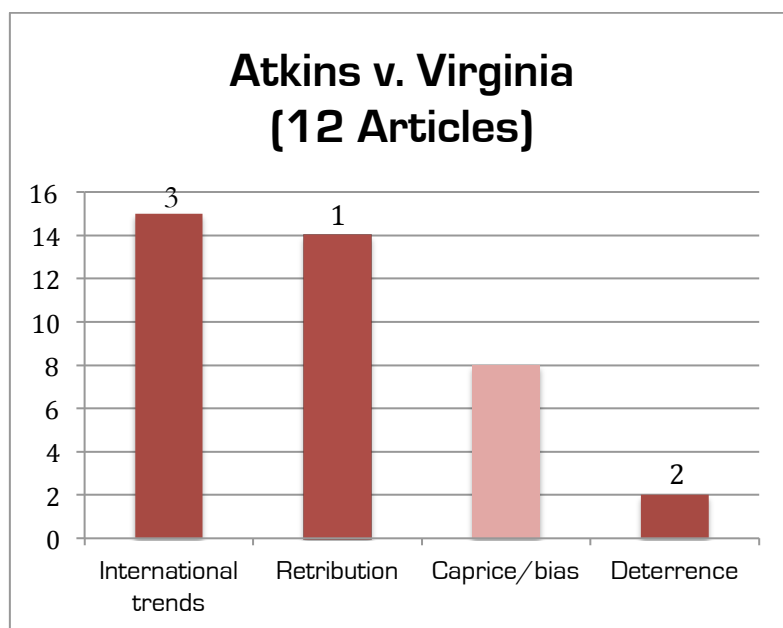
Atkins v. Virginia (2002)

Vote: 6 – 3

Decision: Execution of the mentally retarded is unconstitutional (overturns *Penry v. Lynaugh*)

Frames in Court Opinion:

1. Retribution
2. Deterrence
3. International trends



Set 3: On the Execution of Juveniles: *Stanford v. Kentucky* (1989) and *Roper v. Simmons* (2005)

Stanford v. Kentucky (1989)

Case history

Stanford v. Kentucky was decided on June 25, 1989. The case combined two petitions from two minors who were convicted for capital offenses, one in Missouri and one in Kentucky. For both petitioners, state law forced the juvenile court system to expel the petitioners and try them under the adult courts. This was due to the severity and maliciousness of their crimes, as well as repeated failed efforts at rehabilitation under the juvenile court system. In the adult criminal justice system, both petitioners were given the death penalty and subsequently filed for appeals on the grounds that they had a constitutional right to rehabilitation under the juvenile court system.

In a 5-4 decision, Justices Scalia, Kennedy, Rehnquist, White and O'Connor (partly) ruled that the imposition of the death penalty on criminals who committed their crimes at either age 16 or 17 was not unconstitutional. Justice O'Connor departed from Justice Scalia's concurring opinion in that she believes that, though not applicable in this case, proportionality analysis on the blameworthiness of a defendant is something that the Court has an obligation to weigh, and which may meaningfully delineate the difference between adults and juveniles. Justice Brennan, writing for the dissent comprising of Justices Marshall, Blackmun, and Stevens instead opine that juvenile execution under the age of 18 is unconstitutional. The dissenting Justices point out that legitimate purposes of punishment (limited by *Gregg* to retribution and deterrence purposes only) are not satisfied in the case of juvenile executions.

Arguments in *Stanford* Supreme Court opinions

The strongest frames in *Stanford* are that of historical practice, retribution, and desert, in that order.

Historical Practice. According to the majority Justices, there are two ways to prove the constitutionality of the juvenile death penalty; to determine whether it was permitted during the drafting of the Eighth Amendment, and to determine whether evolving standards of decency in contemporary society prohibit its use. The majority opinion talked at length about how, in light of historical practice

and common law history the death penalty was deemed appropriate for those over the age of who committed capital crimes “and theoretically permitted capital punishment to be imposed on anyone over the age of seven.” The justification from history is the strongest defense the Court offers for why it is not unconstitutional to continue executing minors under the age of eighteen.

Retribution. The retributive argument features more prominently in the dissenting opinion than in the majority opinion. While the majority opinion only declines to engage the retributive argument, Justice Brennan’s spends the majority of his decision in arguing that, from a retribution perspective, juvenile executions are unjustified. The retributive frame encompasses the idea of proportionality “given the culpability of the offender,” as well as that of mitigating and aggravating factors. Justice Brennan writes, “the diminished levels of responsibility” that society attributes to juveniles “reflects the simple truth derived from communal experience that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life.” Based on the retributive argument for capital punishment, blameworthiness, as determined by maturity and responsibility, is categorically not applicable to the juvenile population, and renders them untouchable through the retributive argument for punishment.

Procedural deficiencies. The procedural deficiencies argument is infused into *Stanford* through two distinct ideas: first, the Court affirms the decisions of the juvenile courts in both petitioners’ cases to refer petitioners to the adult court system based on the “viciousness, force, and violence” of their crimes. In leaving unchallenged the decision of lower appellate and juvenile Courts that the defendants were “aware of [their] actions and could distinguish right from wrong,” the Court asserted that the defendants had no right to the rehabilitation juvenile courts may offer, but were rightly referred to the heightened series of punishments available to juries in adult courts.

The Court’s second rejection of the petitioner’s claim that there exist procedural deficiencies in their state criminal justice systems is found in the majority’s opinion. The majority opinion indicates that the petitioners hold a “heavy burden” to establish a national consensus against the juvenile death

penalty. The Court could be thought of as saying, if juveniles deserved not to get the death penalty, let them prove it.

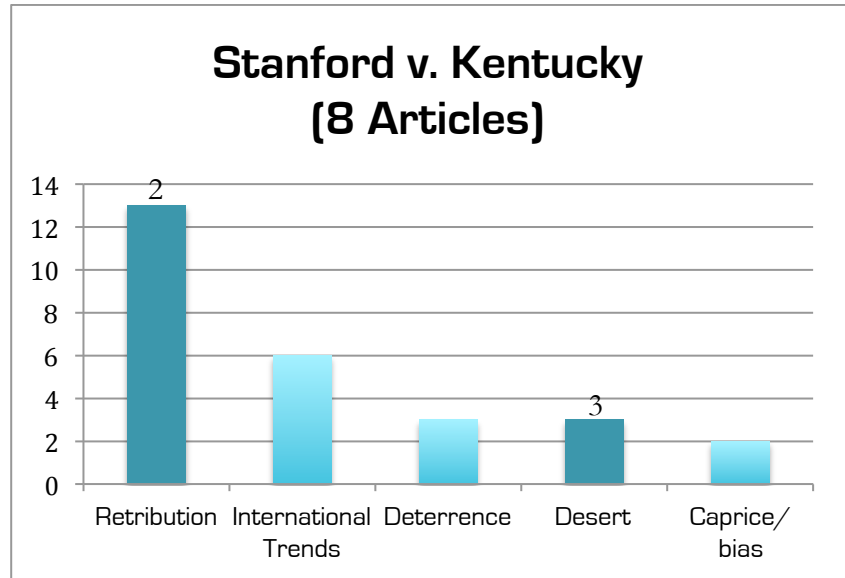
Additional notes

Justice Scalia's majority opinion affirms using the frames of historical practice to justify execution of minors, while rejecting deterrence, rehabilitation, and retribution as frames for the debate.

Justice Scalia's majority opinion makes an explicit prohibition of using indicia such as public opinion, interest and political group opinion, examination of actual "application of the laws" of execution, and "proportionality" analysis to determine the constitutionality of the death penalty. Proportionality analysis, which he indicates was correctly applied in *Enmund v. Florida* and *Coker v. Georgia* and which relies on determining the punishment based on the blameworthiness of the criminal, was not applicable to the juvenile death penalty issue because the subjective application of proportionality needs to be applied by society at large and not by the Justices alone. On the statistical evidence noting a lack of the "application of the laws," that is, the application of the death penalty to those under the age of 18, the Court says, "these statistics... carry little significance." The prohibitions described by Justice Scalia are directly utilized as compelling indicia for the abolition of juvenile executions in *Roper v. Simmons*.

TABLE 6*Stanford v. Kentucky (1989)***Vote:** 5 – 4**Decision:** The execution of juveniles aged 16 and 17 at the time of the crime is not unconstitutional.**Frames from Court****Decisions:**

1. Historical Practice
2. Retribution
3. Desert

*Roper v. Simmons (2005)***Case history**

In *Roper v. Simmons* (2005), the Supreme Court overturned the decision made in *Stanford v. Kentucky* (1989), making unconstitutional the use of the death penalty for those under the age of 18 at the time of the crime. The majority cite a “national consensus” that had dramatically shifted since *Stanford*, based on both “objective indicia of society’s standards, as expressed in pertinent legislative enactments and state practice” as well as the Court’s “own judgment ... on the question of the acceptability of the death penalty.”

The case at hand arose out of Missouri, where then seventeen-year-old Christopher Simmons planned and conducted the murder of a woman named Shirley Cook. Simmons had two underage accomplices with him, one of whom did not participate in the actual crime and testified against him. Simmons and his accomplice planned a break-in, burglary, and murder, which involved suffocating his victim with tape, binding her feet together with electrical wire, and throwing her into the Meramec River. After being taken in for questioning, Simmons confessed to the murder and also performed a videotaped reenactment of the crime. The State sought the death penalty, and the initial court-room proceedings produced a jury recommendation for death penalty, which the court granted. Simmons

unsuccessfully filed appeals to the Missouri Supreme Court in 1997, and to the federal courts in 2001. In 2002, the Supreme Court decided *Atkins v. Virginia*, which triggered Simmons to file a new petition for state post-conviction relief on the grounds that, like in the *Atkins* ruling against application of death penalty for mentally retarded criminals, the Court should find unconstitutional the execution of juveniles.

In order to arrive at the decision in *Roper*, the Court relies on the same standards for “evolving standards of decency that mark the progress of a maturing society” previously relied upon in *Atkins*. The Court points to the number of states that ban death penalty for minors, as well as the infrequency of the application of underage execution in states with no such prohibition, as compared to the same statistics at the time of *Stanford v. Kentucky*. The Court points out that, at the time of the decision, 30 states prohibited juvenile penalty (either expressly outlawing death penalty or indirectly by excluding juveniles from death penalty by express provision). Of the States that do permit for juvenile executions, only six states had executed juveniles since *Stanford*.

Unlike in *Atkins*, the Court goes one step further in undoing the precedent case at hand in *Roper*. In *Roper*, the Court explicitly reneges on the promise it made in *Stanford* when it said it “‘emphatically reject[ed]’ the suggestion that the Court should bring its own judgment to bear on the acceptability of the juvenile death penalty” instead opining that it could use “the Court’s own determination ... of its independent judgment” on whether “the death penalty is a disproportionate punishment for juveniles”

Arguments in *Roper* Supreme Court opinions

The main frames employed in *Roper* are that of retribution, international trends, and rehabilitation.

Retribution. Much like in the *Atkins* opinion, the frame of retribution is evoked in a discussion on the proportionality of the punishment to the crime, particularly as it is based on the culpability of

the criminal. And, unsurprisingly, like all of the cases since *Gregg* evaluated in this research, the opinion in *Roper* cited the requirement set forth in *Gregg* that the two penal ends for justifying punishment were that of retribution and deterrence.

To establish culpability, the majority writes about the general “vulnerability and comparative lack of control” of juveniles and how those qualities allow juveniles to “have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.” They find this lack of culpability by relying heavily on contemporary child development research, all of which indicate that juveniles are reckless, unduly susceptible to outside influence, and additionally most likely to change their errant behaviors upon rehabilitation. Citing Justice O’Connor’s concurring judgment in *Thompson*, the Court reiterates that “capital punishment must be limited to those offenders... whose extreme culpability makes them ‘the most deserving of execution’.” The Court goes on to say that “retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability of blameworthiness is diminished...by reason of youth and immaturity.”

The absolution of adolescent criminals based on a lack of culpability is hotly contested by the two dissenting Justices, Justice O’Connor and Justice Scalia. Both opine that, even if the Court is faced with a largely scientifically and historically validated fact that juveniles are “*generally* less mature and responsible than adults” (emphasis added) and therefore, generally less culpable. However, they write that “the Court’s proportionality argument” nonetheless “fails to support its categorical rule.” Both Justices tend to believe that while youth can serve as a mitigating factor, it cannot categorically remove youths from the death penalty. Justice O’Connor additionally distinguishes juveniles from mentally retarded, saying that they are “qualitatively and materially different,” since a mentally retarded person is “‘by definition’, one whose cognitive and behavioral capacities have been proven to fall below a certain minimum.” (This differentiation is integral to her argument since she upheld the ban on executing mentally retarded criminals.)

International trends. Interestingly enough, the majority devotes a large chunk of its opinion to a discussion of international standards and prohibitions against juvenile capital punishment, all the while proclaiming that those realities “[do] not become controlling.” The opinion delves into treaties and foreign practices, examines the United Nations Convention on the Rights of the Child (ratified by all nations except for Somalia and the United States, as the Court is quick to point out), as well as to the bountiful amici prepared by the European Union, Human Rights Committee of the Bar of England and Wales, etc. Additionally, the opinion similarly singles out the United States in an even larger context: “Only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the DRC, and China. Since then each of these countries has either abolished...or made public disavowal of the practice.”

Unsurprisingly, the two dissenting opinions took great issue with this outward-looking practice. Justice Scalia wrote, “‘Acknowledgement’ of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court’s judgment*—which is surely what it parades as today.” Justice O’Connor is more mild in her disapproval: her unease with the practice mainly arose out of a fear that the Court was using international consensus to make up for the lack of a true domestic national consensus.

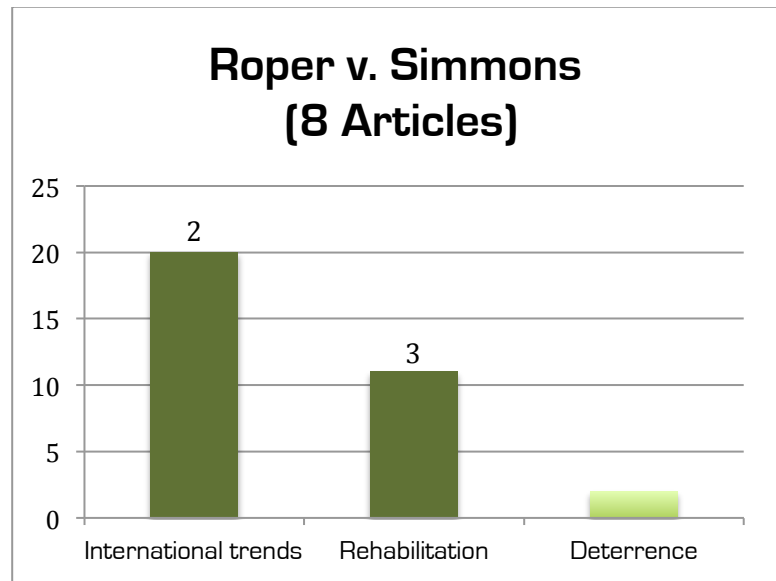
Rehabilitation. The question of rehabilitation is the third strongest frame in *Roper*. It is particularly of importance to the Justices because it is precisely on the question of rehabilitation that *Roper* diverges from *Atkins*. Whereas rehabilitation for mentally retarded criminals seemed unlikely when compared to rehabilitative possibilities for normal adults, rehabilitation for juveniles seems much more likely. Referencing psychological studies done, the majority opinion writes that “qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.” This language clearly invokes the possibility of rehabilitating young offenders. The Court goes on to say more on rehabilitation: “the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.”

TABLE 7*Roper v. Simmons* (2005)**Vote:** 5 – 4

Decision: The execution of mentally criminals under the age of 18 is cruel and unusual. (Overturns *Stanford v. Kentucky*)

Frames from Court Decisions:

1. Retribution
2. International Trends
3. Rehabilitation



CONCLUSIONS

The case study analyses of the seven death penalty cases above lead to three types of observations. The primary observation, and also the larger research question in this paper, concerns the interplay and relationship of Supreme Court arguments and corresponding newspaper coverage. The observations indicate that, as new issues (i.e. jury standards, juvenile execution) in death penalty jurisprudence arise, initial newspaper coverage of the Court's arguments is scattered and misaligned. During these initial periods, the newspapers employ numerous frames to cover the Court's arguments, and the relative importance that newspapers assign those disparate frames do not comport with the importance that the Court assigns to its different arguments. However, when the same issue is brought up again in later Court cases, there is a visible narrowing and closer alignment between the Court arguments and the newspaper frames. This primary finding holds most support for hypothesis 1.

Additionally, two secondary observations can be made about the Court's general death penalty jurisprudence as well as trends in newspaper coverage of death penalty cases. These two observations help contextualize the primary discussion on the interplay of the Court and the media.

Interplay Between Court Arguments and Newspaper Frames

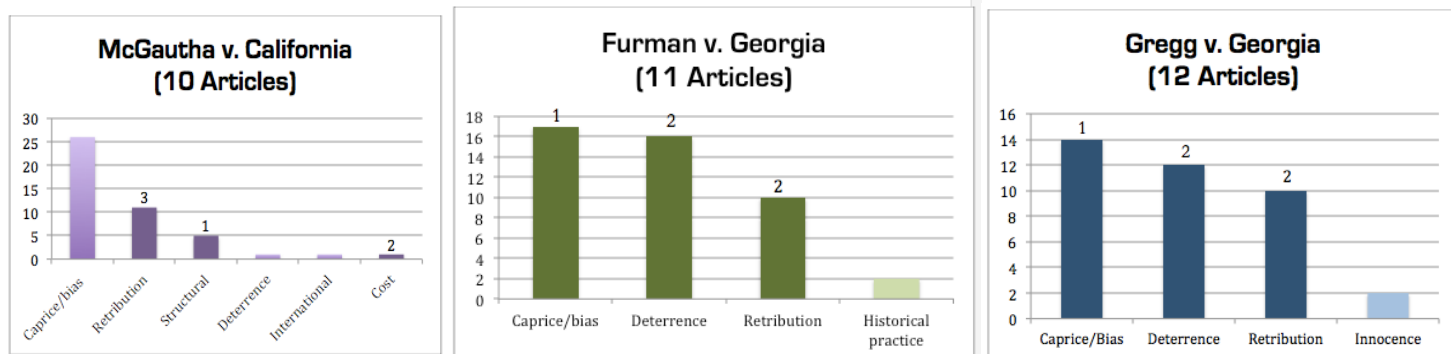
A longitudinal overview of both the Supreme Court arguments on death penalty jurisprudence and the newspaper frames reveals that newspaper article frames tend to reflect a more historical argument from the Court. That is, in each death penalty issue area, the Supreme Court appears to set the boundaries of the debate, and then the news media follows those frames, if not in coverage of the initial case, then definitely in subsequent cases on the issue. On rare occasions, newspapers have defined and retrained the focus on the death penalty debate, and in doing so, seemed to guide the arguments in future Court discussions. This finding is largely consistent with hypothesis 1 (the Supreme Court initiates the frames and arguments in death penalty discourse and newspaper frames follow in framing, but with lag-time).

The lag-time between Court adoption and media uptake can be explained in two main ways. The first is to look at the spread and variety of opinions that the newspaper articles evoke (narrowing frames), and the second is to look at the relative importance assigned to those arguments and frames by the Court and the media respectively (alignment).

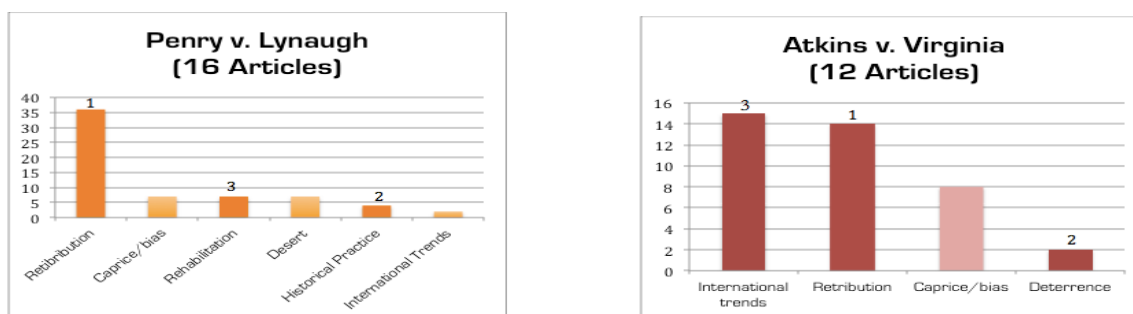
Narrowing Frames

Through the first approach, one can see that for each issue area, whether that is jury standards, execution of minors or execution of the mentally retarded, there is initially a large number of frames exhibited in the newspaper coverage of the first Court case but, that the spread of the frames becomes narrowed in subsequent Court cases on the same issue.

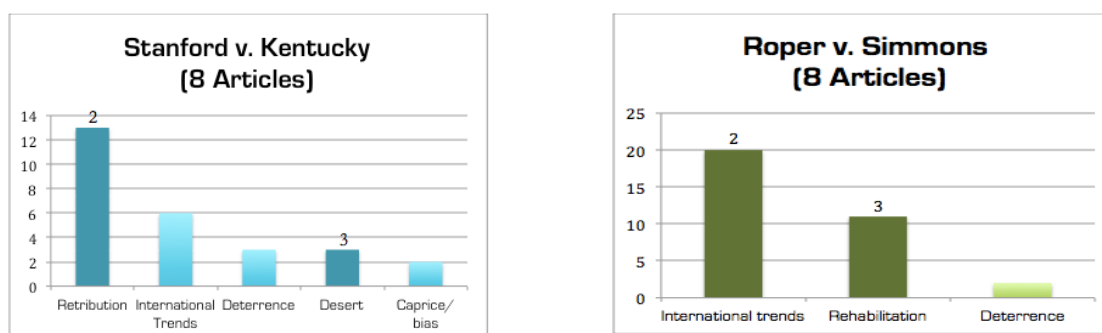
Set 1: Jury Instruction Cases (1971-1976)



Set 2: Execution of Mentally Retarded Offenders (1989-2002)



Set 3: Execution of Juvenile Offenders (1989-2005)



What these diagrams indicate is that when journalists are first exposed to a new issue in death penalty jurisprudence, they tend to highlight frames that are not necessarily the Court highest priority arguments, and cover a multitude of frames. For example, on the issue of juvenile executions, the media starts out with identifying five frames in *Stanford*, but restrict their analysis to only three frames by *Roper*. This narrowing of frames is evident in all three issue-areas examined.

Gradual Alignment of Frames

The second approach uses the alignment as a metric. Alignment refers to the alignment of relative importance attributed to each frame or argument by the newspapers and the Court. The graphs above indicate that while there is an initial period of misalignment at the introduction of an issue area, alignment is strengthened by later court cases in the same issue area.

There are multiple explanations for this increase in alignment over time. One such explanation is that the Court reporters are able to return to past Court cases dealing in the same death penalty issue to examine arguments previously made by the Court to anticipate contemporary. For example, a Court reporter such as the Los Angeles Times' Linda Mathews could have reasonably taken information and arguments she discovered in her 1972 coverage of *Furman v. Georgia* and applied it to her 1976 analysis of *Gregg v. Georgia*. Another closely related explanation is that journalists grapple with a learning curve when identifying the most relevant frames. They become better at gauging the most critical arguments to the Court after some time passes between the first time the issue is introduced at the Supreme Court level, and the next instance of reporting on a later Court case.

It must be noted that while the theory of alignment suggests a unilateral direction of influence (arguments come from the Supreme Court and become adopted by pliant journalists), there are two arguments and frames that represent strong deviations from the trend. They are the caprice/bias argument identified in the set 1 cases, and the international trends argument from the set 2 and 3 cases. These two frames represent the only two instances in this study for which frames originating or

espoused by newspaper articles appear to lead the way for Court arguments of the same. Indeed, hypothesis 2, rather than hypothesis 1 more adequately describes the demonstrated trends: frames are initially introduced by newspaper articles and only later become adopted by the Court.

The first deviant frame is that of caprice/bias, which is introduced by news coverage of *McGautha* at a time when the Court did not much heed the caprice/bias argument. Referring to the graph below, one can see that the Court opinion in *McGautha* did not deem the caprice/bias argument to be persuasive, since the Court does not even refer to the argument as one of its top three concerns. However, newspaper coverage of *McGautha* revealed that the caprice/bias frame was the most important frame of any frame covered. In later years, the Court seems to pick up on this trend in the subsequent *Furman* and *Gregg* cases, in which they vault the caprice/bias argument upwards as the most important argument in both cases. During these two cases, newspaper articles also deem the caprice/bias frame the most relevant. In set 2, the media indicates that the caprice/bias frame is its second most important consideration in *Penry*, and in *Atkins*, the 3rd most important frame, while the Court stays neglects to deem the caprice/bias frame compelling at all.

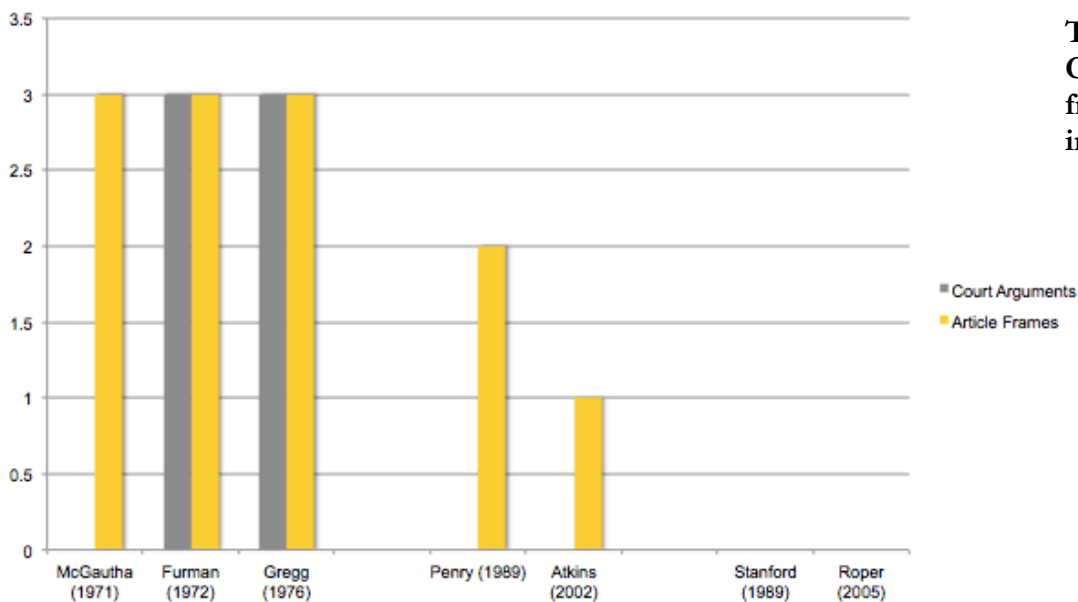


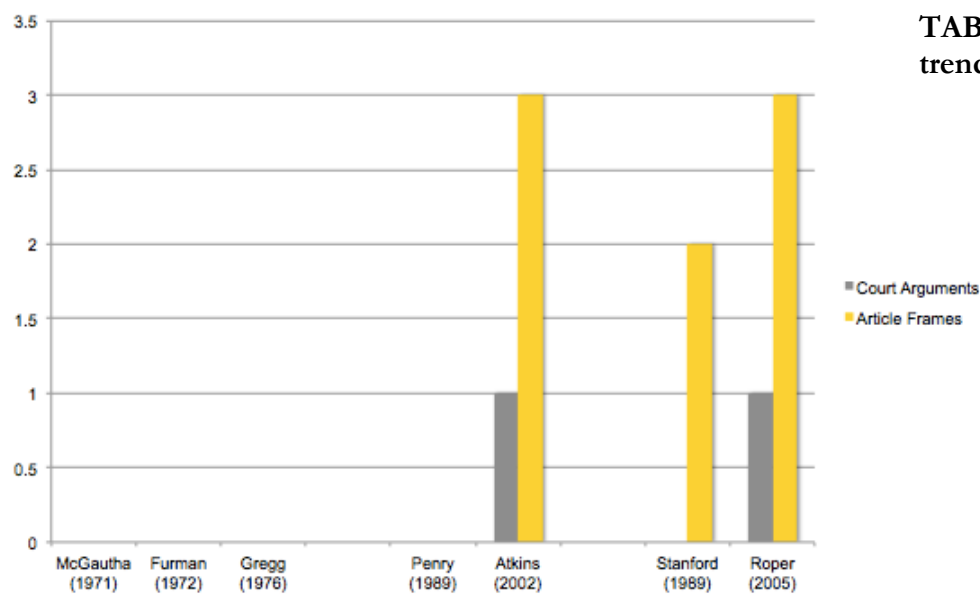
TABLE 8:
Caprice/bias
frame
importance

While the caprice/bias frame is not unique in its bucking the trend predicted in hypothesis 1, it

is still highly unordinary. The exceptional nature of this frame may arise from the case facts presented by *McGautha* and the set 1 cases. In *McGautha*, though the Court is faced with answering whether the current criminal procedures were capricious in nature or fair (as represented by untrammelled jury discretion and flexibility between unitary and bifurcated trials), it really only discusses the history of the procedures themselves and explains the Court's reticence to legislate from the bench and intrude upon the sovereignty of states in deciding capital punishment legislation. It is unsurprising that the newspapers would have picked up on this large gap between the question posed by the Court and the answer given. Perspicaciously, the newspaper reporters focused in on the question of caprice and bias in American courtrooms, despite the Court's silence on the subject. Whether the Court's subsequent adoption of the caprice/bias argument in *Furman* and *Gregg* can be contributed to its heeding news media interests cannot be answered by this paper; yet what is important to note is that for set 1 cases, there is a clear instance of the Court following behind the media.

The international trends frame is the other frame that does not neatly conform to hypothesis 1. As was the case for the caprice/bias argument, the misalignment surrounding the international trends argument occurs with newspaper coverage calling attention to the issue at a time with no corresponding Court acknowledgement. In its 1989 coverage of *Stanford*, newspapers demonstrated that the second most important frame was that of international trends: they were very interested in comparative analyses on how other nations considered executions of the mentally retarded "barbaric" and "anachronistic." The Court on the other hand, opted not to highlight or acknowledge the international consensus on the issue in 1989. However, by the *Atkins* decision in 2002, the Court began to controversially include verbiage on the death penalty practices of comparable Western nations. News reports on *Roper* focused excessively on the international dimension of the debate, making the international trends frame the most important news frame in *Atkins*. Though to the Court the international trend argument only ranked third in importance, the fact that the frame was among the top three arguments is already indicative of a dramatic shift, since the Court general eschews looking

beyond American borders for legal guidance. Likewise, in 2005, newspaper coverage presented the *Roper* decision primarily in the light of the international trends frame, and the Court similarly also acknowledged their consideration of the international trends argument by again ranking the argument third among its top three arguments.



It is no surprise that on the issue of foreign precedent and international consensus that newspapers lead the way for the Court. After all, newspapers are more interested in reporting Court cases when they deal with issues as volatile and morally-charged as the executions of juveniles (set 3) and mentally retarded offenders (set 2). Unlike for the highly technical and procedural cases in set 1, the cases in set 2 and set 3 lend themselves to getting reported from different angles besides the sole one coming from the judiciary. Journalists are not confined to gleaning information from the Supreme Court alone on questions of morality, psychology, and progressiveness. It is no coincidence that newspaper reports on cases from sets 2 and 3 contain a formidable number of quotations and references to the opinions of interest groups ranging from the EU, presidents of nations that have abolished the relevant forms of executions, development psychologists, and the like. When a multitude of sources are available, journalists are free to seek outside expertise on the case at hand without having

to rely on the often-complex, jargon-filled ruminations on the Court. In the set 2 and set 3 cases, the newspapers clearly take this liberty.

A further exploration of the deviance from and compliance with hypothesis 1 can be found through a case-by-case analysis of the interplay between Court arguments and newspaper frames. The case-by-case analysis provides additional background and explanations of the narrowing and alignment trends discussed.

Set 1: *McGautha* opinion v. media

There was not a great alignment of frames between the Court and the newspapers. The Court focused on procedural aspects of the case, citing historical trends that justify its decision not to grant more procedural rights to defendants standing trial for capital offenses, whereas the newspaper coverage at the time picked up on the petitioners' claim, which was that the sentencing procedures were capricious and prone to bias. The retributive frame was the second most salient frame in the newspaper articles, and also the third most prominent frame from the opinion, meaning it was more or less equal in importance to both the Court and the media. However, whereas the Court found the cost frame to be persuasive (it would impose too much financial burden on the states to re-design sentencing procedure) in turning down the petitioners' claims, the newspaper reports seem to pay little heed to the possible costs of implementing a new sentencing procedure. In fact, out of the six newspaper frames arising from articles on *McGautha*, the cost frame was the least salient frame.

Set 1: *Furman* opinion v. media

In the case of *Furman*, we see a perfect alignment between the strongest frames from the Court itself and also what the media propagates. The frames used in the Court decision are not only all present in the newspaper articles, but they are represented also in the exact order of importance. The strongest frames in both the Court opinion and the articles are caprice/bias, deterrence, and retribution.

It could be possible that the saliency of arbitrariness and caprice stems from the controversial discussion of race and socioeconomic status implicated in the death penalty, a topic which newspaper audiences could easily consume, but it is just as likely that the newspapers faithfully and astutely conveyed the very points on capital punishment that the Court was keen to make. We see that in both the Court opinion and the articles that the race and arbitrariness are of high import in considering whether or not the death penalty should be struck down. Similarly, we observe the arguments from deterrence, the second strongest frame, being defended and rejected at the Court level, the articles also vacillate on whether deterrence is a useful (or even desirable) ends to punishment. Additionally, both the articles and the Court opinion address the role of retribution in punishment, with both sources equivocating on whether retribution is appropriate in criminal justice. Additionally, Justice Marshall's concurring opinion actually outlines several frames that he believes the Court should consider in matters related to the death penalty; that he mentions a couple of such opinions may account for why such a large number of (albeit weakly propagated) frames were also evident in *Furman's* corresponding newspaper coverage.

Set 2: *Gregg* opinion v. media

Much like *Furman* before it, the Court opinion and the newspaper articles both identified and bolstered the same frames with perfect alignment. The strongest frames and most salient frames respectively were that of caprice/bias, deterrence, and retribution, in that order. One should note that the sequence of strongest frames here is also an exact repetition of the strongest frames in *Furman*. This should come as little surprise, however, since the petitioners in *Gregg* were seeking to find loopholes in the *Furman* decision in order to reinstate the state-level death penalty statutes that *Furman* had struck down. Recall how the Court ruled in *Furman* that the death penalty statutes of all states were suspended due to the capricious and racially-linked biases inherent in the statutes. It is important to note that the *Gregg* opinion is instrumental in that its majority opinion will become frequently cited in later death

penalty cases. Justice Stewart's majority opinion spells out that deterrence and retribution are the only two legitimate considerations in discussions on the death penalty. In fact, we see the opinions in *Penry*, *Stanford*, *Roper*, and *Atkins* each reference Justice Stewart's famous words as a reference point.

Set 2: *Penry* opinion v. media

The *Penry* case evokes a more mixed coverage of the Supreme Court decision; there is no perfect alignment, but there is also no clear divergence of the decision and the corresponding articles. Of the three strongest frames in the Court's own decision, only two were salient in the articles; the Court's strongest frames were retribution, historical practice, and rehabilitation. The articles demonstrated that the most salient issues were retribution, caprice/bias, and rehabilitation. (Historical practice, while covered in the articles, was not a high saliency frame.) It could be the case that the reporters writing the *Penry* opinion have become accustomed to writing with the retributive frame in mind, since *Gregg* established the high import of retribution to criminal justice. At the same time, taken in conjunction with the strength of the retributive frame in the Court's own opinions, the high saliency of the retributive frame in the articles seems hardly like a coincidence. In fact, it seems as though there is a strong correlation between the opinion and the articles themselves.

The lack of mention of the Court's second strongest frame, that of historical practice, could perhaps be explained by the technical nature of the Court's historical practice argument, as well as by the sheer unpersuasiveness of the argument. Recall that the Court cited some contradictory historical evidence that indicated a common law prohibition against executing "idiots," but then went on to distinguish "idiots" as those who were severely retarded, and not moderately or mildly retarded.

Set 2: *Atkins* opinion v. media

While correlation between Court frames and newspaper articles was not perfectly aligned, the alignment was more coherent than it had been for *Penry*, earlier. Of the three strongest Court frames,

that of retribution, deterrence, and international trends, all three appeared to gain a foothold in the articles reporting on the *Atkins* decision, though not necessarily in the same order of importance and saliency. While international practices on executing the mentally retarded was only the third strongest frame in the Court's opinion, it was the most prevalent frame in the articles. The retributive frame ranked high in both sources, ranking as the strongest frame in the Court opinion and the second most salient frame in the articles. Deterrence was the second strongest Court frame and the fourth strongest article frame. Interestingly enough, the third strongest article frame, that of caprice/bias was not utilized by the Court. It could be the case that the newspaper articles reflected an older reasoning from previous Court cases on death penalty, and held on to that frame despite a lack of caprice/bias frame in *Atkins*. A holistic evaluation of the cases from set 2 would enable use to see that, in comparison to the correlation found in *Penry*, that the divergence between the Court opinion and the newspaper opinion narrows, that is, the papers seem to be adopting the frames the Court is espousing with some lag, but nonetheless propagating the frames used by the Court. We saw a similar phenomenon occurring in set 1, when initially for *McGautha*, the divergence between the opinion and the articles were large, but eventually became fine-tuned with the introduction of *Furman* and *Gregg*.

Set 3: *Stanford* opinion v. media

The relationship between the Court opinion in *Stanford* and the articles covering the decision are not very strongly correlated. There is at best, a weak alignment of frames and at the worst, a distinct divergence in frames. We see the Court identifying historical practice, retribution, and desert as the most important frames in its own opinion, while the papers picked up on retribution, international trends, deterrence, desert, and caprice/bias, in that order. It is very significant to note that the strongest Court frame, that of historical practice, is not even identified in any one of the newspaper articles analyzed. This indicates that the journalists reporting on the decision were not interested in hearing a historical justification of how juvenile executions have been permitted, nor were they interested in

offering that to their readership. However, the journalists deemed the frame of retribution to be the most important frame, closely mirroring the opinion of the Court, which ranked retribution as the second most important frame. Retribution has been a not-unfamiliar frame, and is especially appropriate since the discourse in *Stanford* revolved around whether persons with diminished culpability should be given so hefty a crime. Interestingly enough, the newspapers compare the domestic ruling to other international trends in executing the mentally retarded defendants in an apparent effort to shed light on America's backwardness in the policy area. The Court, besides in acknowledging the two amici briefs it received from Amnesty International and the International Human Rights Law group in a footnote, does not mention or compare the domestic policy to any foreign policy. Both the papers and the Court opinions pay homage to the desert frame, which comes in at the third strongest frame in both sources.

It is again significant to note here (as it was in the discussion on *Penry*) that the frame of caprice/bias is affirmed through newspaper reporting even though the corresponding Court decision makes relatively little reference to capricious or biased sentencing. This seems to indicate again that the newspapers are holding on to previous frames they have encountered from earlier death penalty cases and identifying the frames in decisions in which caprice/ bias frames are not the most important frames to the Court.

Set 3: *Roper* opinion v. media

In the *Roper* case, we see a more closely-aligned relationship between the Court's opinion and the corresponding news articles than we saw in the earlier juvenile execution case of *Stanford*. Of the three strongest frames in the Court decisions (retribution, international trends, and rehabilitation), two were identified as focal and significant by the journalists, for whom the international trends, rehabilitation, and deterrence frames were the most important. Surprisingly, the retributive frame so expounded upon by the Court is nowhere to be seen in the newspaper coverage; instead, it is

international trends are the hottest topic in print. The latter is unsurprising, since we have seen similar trends in *Atkins*, which guides much of the juridical strategy that the petitioners in *Roper* rely on. International trends reported in the newspapers was in *Roper* what it was in *Atkins*; a space where journalists could leave behind the Court's complicated jargon and instead use plentiful outside data and sources from media-friendly interest groups such as Amnesty International or the American Psychological Association. The prevalence of the international trend spotlight in the press is also more closely tied to the Court decision at hand however, since we did identify that Justice Scalia and Justice O'Connor derided the practice of looking outward to other legal regimes to inform domestic justice systems and that the international trends frame represented the second strongest frame in the Court opinion.

Trends in Court Death Penalty Jurisprudence (1970s-2000s)

Recalling that prior to *McGautha* only five cases have been decided by the Supreme Court relating to the question of the death penalty, it must be noted that the high number of death penalty decisions handed out by the Court since 1971 (an additional thirty three, to compose 39) is indicative of a newly invigorated discussion on the role of the punishment in society. It is then, both significant and perhaps unsurprising that up until the 1980s, the Supreme Court treated the question of capital punishment no differently than it considers other modes of judicial punishments. For example, in the minds of the 1971 *McGautha* majority, the death penalty did not differ in type from pecuniary punishment or prison time, only in degree. The attitude towards the death penalty dramatically shifted by the time of *Penry* and *Stanford* (1989), where it is referred to as the ultimate penalty and differentiated by its extremity and its finality.

Whereas prior to *Gregg* (1976) the range of justifications for the death penalty was undefined and remained nebulous, the majority opinion by Justice Stewart significantly narrowed and focused the future rhetoric of the Court: "the death penalty is said to serve two principal social purposes:

retribution and deterrence of capital crimes by prospective offenders.” *Gregg* and the four synchronous cases associated with its decision have come to represent the beginning of the so-called “modern era of capital punishment,” characterized by discussions centered on retributive and deterrence-oriented ends.

Accordingly, as is evidenced in our discussion of sets 2 and 3, the more recent cases involving the categorical restriction of executions on groups of persons have largely involved discussions on using new findings in psychology and social development in order to prove that neither retributive ends nor deterrence ends can be met by the imposition of the penalty on the relevant class of person. The Court drew heavily on sociological and scientific data provided by various interest groups and incorporated those findings, relating to the moral culpability of those with diminished brain capacity. (In a conversation I had with Lawrence Steinberg, co-author of “Not Guilty by Reason of Adolescence: a developmental perspective on youth and the law,” the article the Court cites extensively in its *Roper* opinion, Dr. Steinberg attributed the dramatic change of Court opinion from permitting to prohibiting juvenile executions to interest group efforts and the irrefutability of sociological evidence). This is a marked change from the Court’s unwillingness to heed sociological studies presented in the earlier cases from set 1, where the Court reviewed evidence suggesting that there was very little deterrence value in the current death penalty scheme.

Besides these trends in Supreme Court approaches to the death penalty, one other trend must be noted. The opinions rendered in death penalty cases tend to be much longer than other issues before the Court. At the time of its rendering, *Furman v. Georgia* became the longest opinion ever written, spanning over 233 pages. Other death penalty cases have also been extremely lengthy, and by examining the proliferation of concurring and dissenting opinions, one can see that it is seldom the case that Justices are willing to join in on the opinions of other Justices in full, mostly preferring to join in part, or two write separate concurring opinions. For example, in *Gregg*, the majority was written by Stewart, joined by Powell and Stevens; three Justices filed concurring opinions (Rehnquist, White, and Blackmun), while two separate dissents were written by Brennan and Marshall. In *Perry*, Justice

O'Connor wrote the majority opinion, and her opinion was supplemented by three other opinions concurring and dissenting in part.

Taken together, a more cogent picture of the Court comes into view: when it comes down to death penalty cases since the 1970s, the Court has not been shy in getting involved. It has been loath to compromise on divergent opinions and save on multiple opinions when there was opportunity to express and create multiple dialogues through concurring and dissenting opinions. It has changed its mind on the relevance and bearing of sociological and scientific data presented. It has also identified two strong frames that it will consider in death penalty cases, and in doing so, given the legislatures that must respond to the Court, some guidance for how to craft and adapt more constitutionally viable iterations of capital punishment.

Trends in News Coverage of Death Penalty

Beyond the comparison of frames between the Supreme Court case and its corresponding news-articles, the data provides an interesting look at the evolution of Supreme Court reporting over time. There is a significant shift in focus from the articles written in the 1970s compared to those in the 2000s. For one, where the article focus used to be centered upon the facts of the case, and the arguments made by litigators, as well as the implications of the ruling on those classes of people affected by it, the more recent trend in reporting has centered on predicting the breakdown of the vote, and scrutiny around Court coalitions and voting records of individual Justices. Whereas in the earlier cases from set 1 tended to be more reporting done after the rendering of the verdict, there are comparatively more newspaper articles before the rendering of the verdict in the early days examined, now it appears that the proportion of articles surrounding a case are being published in light of the decision.

For example, 50% of newspaper articles that covered *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976) were case-fact oriented in nature. I determined that an article was case-facts oriented if it

recounted in detail the facts of the case and provided details such as the original crime, quotes from litigators, and provided aggravating or mitigating evidence. This high percentage of articles focusing in on the case-facts declines somewhat in set 2, with 43% of the articles *on Penry v. Lynaugh* (1989) focusing on the case facts, and 50% in *Stanford v. Kentucky* (1989). However, by the set 3 cases, that percentage clearly dips, down to 37% in *Roper v. Simmons* (2005) and 12% in *Atkins v. Virginia* (2002).

This trend may be in part due to a popularly perceived notion that the Supreme Court has become more and more susceptible to ideological leanings in recent years. Regardless of the veracity of that belief, it has encouraged a focus on individual votes from members of the Court, and discussions of the political motivations behind Court coalitions.

Limitations, Implications, Further Research

With the significant advantages of using a case-study approach come certain limitations. Some drawbacks of the case-study approach employed include the limited nature of the study's generalizability outside of Supreme Court cases and outside of death penalty contexts. Death penalty issues made for interesting study in part due to their high saliency, but that very same high saliency characteristic may also contribute to the potentially unrepresentative nature of the conclusions drawn here. Additionally, the limited nature of the articles available from ProQuest may have diminished both the number of relevant articles examined, as well as contributed bias in the kinds of newspapers that were represented. ProQuest's databases largely provided archives from more metropolitan and more widely-read papers.

In order to further bolster the conclusions found here, three kinds of further research can be pursued. One such approach would be to apply the methodology outlined in this paper to the rest of the 32 Supreme Court death penalty cases (there will soon be 40 death penalty cases after *Hall v. Florida* is decided in 2014 to clarify challenges to the *Atkins* decision). Another would be to extend the same methodology to other Supreme Court cases involving the Eighth Amendment and debates

surrounding all kinds of punishment. The final recommendation would be to pursue research that compares the public and newspaper attitudes towards death penalty over the time period studied in order to provide more context to possible motivations of the press in selecting the frames exhibited.

This study holds important implications for the Supreme Court, and also the reporters on the Supreme Court beat. The Court, armed with the expectation that the press may not immediately hone in on arguments most important to the Court, can endeavor to clarify and prioritize its points for better press interpretation. This implication applies especially to the inaugural decision on the introduction issue areas. The Court may be additionally incentivized to clarify its inaugural decisions since surveys of appellate and district court judges reveal that practitioners of law depend heavily on newspaper accounts of Supreme Court decisions, and not on law review articles or Supreme Court decisions themselves.

For the Court reporters, the exceptions found in their persistent coverage of the caprice/bias frame in the 1970s and their use of international trends in death penalty have proven that the directed efforts of their coverage may indeed influence and help define the parameters of future Supreme Court debates. This should encourage Court reporters not only to report the facts of the decision, but also to contemplate the possible repercussions of their espousing particular frames of analysis.

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APPENDIX A

For example of how an article is assigned its three frames, and its additional factors, look to the below article on *Gregg v. Georgia*, and its annotations. The additional factors present have been denoted in red bubbles and red text, while discussions of the relevant frames are in blue.

- Publication Date: July 3, 1976
- Headline: *Decision is 7 to 2: Punishment is Ruled Acceptable at Least in Murder Cases*
- Publication organization: New York Times
- Breakdown of decision? Yes
- Direct quote from majority Justices? Yes
- Direct quote from dissenting Justices? Yes
- Court-focused? Yes
- Case-fact focused? No
- Editorializing? No
- Mitigating background story of defendants? No
- Description of crime committed? Yes
- Mention of amicus curiae? No
- Invokes phrase “cruel and unusual”? Yes
- Invokes phrase “evolving standards”? No
- Discusses implications of decision on current death row population or statutes? Yes
- Citation of previously-decided cases? Yes, refers back to *Furman v. Georgia*
 - *Frame 1: Retribution*
 - *Frame 2: Deterrence*
 - *Frame 3: Arbitrariness*

For the below article, one can see that three frames (caprice/bias, retribution, deterrence) are all mentioned: how, then, are their relative rankings determined? For one, the caprice/bias frame is not mentioned explicitly: it is only referenced through the idea of “arbitrariness” or a lack of “consistency,” and only discussed in as far as the impact of arbitrariness on the earlier *Furman* decision. That is easily the weakest of the three frames. The frames of deterrence and retribution are both mentioned explicitly and discussed in detail, but the discussion on the deterrence frame is shorter in length. Additionally, we see elements of the retributive frame interspersed in the article – near the end of the article, there is talk on the permissibility of mitigating factors, which entails the retributive frame’s concerns with evaluating blameworthiness. Because the retributive frame is discussed in more detail, and in more sections than the desert frame, the strongest frame in this article is retribution, followed by desert, and trailed by caprice/bias.

DECISION IS 7 TO 2: Punishment Is Ruled Acceptable, at Least in ...
New York Times (1972; Current file), Jul 3, 1972.
ProQuest Historical Newspapers: The New York Times (1851-2009)

DECISION IS 7 TO 2

Punishment Is Ruled Acceptable, at Least in Murder Cases

By LESLEY OELSNER

Special to The New York Times

WASHINGTON, July 2—In a somber and dramatic session, the Supreme Court ruled by a vote of 7 to 2 today that the death penalty is not inherently cruel or unusual.

The Court found that it is a constitutionally acceptable form of punishment, at least for murder.

In 1972, the Court ruled, 5 to 4, that capital punishment was

Excerpts from court's decision are printed on page 6.

then practiced in America violated the Constitution's Eighth Amendment ban on cruel and unusual punishment, citing the arbitrary and "freakish" way in which some defendants were sentenced to die and others were allowed to live.

Today, however, reviewing five of the state statutes that were passed in response to the 1972 ruling in attempts to meet the Court's objections, the Court said that judges and juries may impose the penalty so long as they have been given adequate information and guidance for determining whether the sentence is appropriate in a particular case.

Some Statutes Permissible

Statutes that provide for this information and guidance—requiring judges and juries to take account of mitigating as well as aggravating circumstances, for instance—are permissible under the 1972 ruling, the Court found.

It also ruled, by a vote of 5 to 4, that states may not impose "mandatory" capital punishment laws requiring the death penalty for every defendant convicted of murder. But its 7-to-2 judgment on the issue of the penalty's inherent constitutionality, and the various opinions of the seven Justices who joined in that judgment, make clear that statutes that come close to being mandatory will be permissible.

The impact of the Court action on the New York death penalty law was not clear. A spokesman for the NAACP Legal Defense and Educational Fund Inc. described the law as "a unique statute." Joseph Gormley Jr., Connecticut's chief state's attorney, said the decision appeared to indicate that his state's capital punishment law was constitutional. New Jersey does not have a death penalty.

3 Statutes Upheld

The Court upheld three of the state statutes before it today—those of Georgia, Florida and Texas—and struck down two, Louisiana's and North Carolina's. The Louisiana and North Carolina laws imposed blanket mandatory rules.

The Texas statute, however, also has a form of mandatory death penalty: Death is required as the penalty in murder cases, if the jury in a separate trial on the issue of sentence answers affirmatively each of three specific questions about the defendant and the crime. The Court found that this procedure required the jury to consider the particular case, including mitigating circumstances, and that this satisfied the Court's standard.

After the 1972 ruling, 35 states and the Federal Govern-

Finding Frames: Deciphered

Text in blue denotes frames of punishment
Text in red discusses other factors (not frames)

Gives ruling breakdown

Evokes the term "Cruel and Unusual"

Direct reference to arbitrariness, which signals the Caprice/bias frame. Even though this refers back to Furman, it is still evocation of the Caprice/bias frame.

Jack Greenberg, left, and Anthony J. Amsterdam as they discussed the decision of the Supreme Court on the death penalty yesterday. Mr. Greenberg is the director-counsel of the Legal Defense and Educational Fund of the National Association for the Advancement of Colored People. Mr. Amsterdam had argued the case before the Supreme Court.

Justices Uphold Death Penalty, 7 to 2

Continued From Page 1, Col. 8
ment imposed various kinds of death penalty legislation. The high court of Illinois subsequently struck down its state's law. Approximately 600 persons are on Death Row as a result of those laws.

Today's ruling may invalidate slightly more than half of the statutes and, in so doing, save some 300 persons from execution. However, it opens the way for every state to have a statute that is acceptable to the Supreme Court, simply by modifying or revising its law to approximate one of the three specifically upheld today.

Capital punishment has been the source of bitter and emotional dispute for years, on legal grounds as well as for philosophical and religious reasons.

Prosecutors have traditionally demanded it, saying it is necessary as a deterrent. Substantial portions of the public have assented, according to public opinion polls, and their agreement has often made the issue a political one.

Opponents have contended that it is not a deterrent, and that it is barbaric, a relic of the past that has no place in civilized society.

No Deaths Since 1967

Because of this dispute and because of the legal battles over the penalty's constitutionality, led in large part by the NAACP Legal Defense and Educational Fund Inc., no one has been executed in America since June 2, 1967. On that day Louis Jose Monge was put to death in the gas chamber in Colorado after pleading guilty to murdering his pregnant wife and three of his seven children.

It will probably be some months before this decision, because of the delay in getting to get a majority, will be legal battle. Today's ruling, but the judgment today means that the main legal battle is over.

In the 1972 ruling there were nine separate opinions, one for each of the nine Justices. That meant that the Supreme Court's holding was the lowest common denominator of the rulings of the five majority Justices—that it was the wantonness and discretionless way in which juries applied the death penalty that made it unconstitutional.

Today, the Court again split and there was no one opinion joined by a majority. In the five separate cases, each involving one state law, there were a total of 24 opinions.

Different Groupings

The holding of the Court today is thus the view again represented in the lowest common denominator, the view taken jointly by Justices Potter Stewart, Lewis F. Powell Jr. and John Paul Stevens. On the issue of the penalty's inherent constitutionality, they were joined by Chief Justice Warren E. Burger and Justices Byron R. White, Harry A. Blackmun and William H. Rehnquist. On the issue of the validity of blanket mandatory rules, they were joined by Justices William J. Brennan Jr. and Thurgood Marshall.

In 1972, Justice Stewart and White were among those who voted to strike down capital punishment, as it then existed. The other members, who made up the five-man majority in 1972 were Justices Brennan, Marshall and William O. Douglas, who retired last year and was replaced by Justice Stevens.

The basic positions of the various groups of Justices on today's ruling broke down thus: Justices Stewart, Powell and Stevens contended that for the penalty to be valid, the statute had to specify the discretion of whoever metes out the penalty whether judge or jury, so as to eliminate arbitrary results. The judge or jury has to make a particularized finding regarding the defendant's character or the circumstances of the crime.

Justices White, Burger and Rehnquist would allow the states more leeway, seeing them only to enact laws that would result in the penalty's being imposed with some reason-able consistency.

Justice Blackmun for his part apparently would also give the states broad leeway. He did not issue any opinions today, however, other than brief statements referring to his dissent in the 1972 case.

Justices Brennan and Marshall would ban the death penalty altogether.

The Stewart-Powell-Stevens views, the ones that are now the law of the land, were laid out most fully in the opinions involving the Georgia and North Carolina laws.

The Georgia case involved a statute that was signed in 1972 by Jimmy Carter, the prime contender for the Democratic presidential nomination. The Justices made a three-part finding on this law. First, they found that the death penalty was not inherently unconstitutional. Next, they found that statutes could be drafted to comply with the 1972 decision, and third, that Georgia's was satisfactory.

No Ban Construed

At the time the Eighth Amendment was passed, it was not construed to ban death. The Justices noted that this was not a decision for under a long series of rulings, the Court has established the principle that the penalty is to be viewed in relation to evolving standards of decency.

The test established by the Court over the years, they said, was instead whether a punishment was excessive either as unnecessary and wanton infliction of pain, or as grossly disproportionate to the severity of the crime.

The Justices found basically that the death penalty would not always be considered excessive. They relied heavily on the fact that many state legislatures had enacted laws reflecting contemporary standards of decency, and that legislatures had considered the penalty necessary as a deterrent.

Of retribution, they said: "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal procedures rather than self-help to vindicate their wrongs."

Deterrent Inconclusive

The Justices said that the value of capital punishment as a deterrent was unknown, studies of it having come to "inconclusive" results. They said they assumed that it might have no deterrent effect in crimes of passion, but that it might in cases of "carefully contemplated murders, such as murder for hire." The matter, they said, was best left to the legislatures.

The final question was thus whether death was a disproportionate penalty for murder, the one crime that the Court said it was considering.

"There is no question that death as a punishment is unique in its severity and irrevocability," the Justices said. But, conceding that against murder, they said, "we cannot say that the punishment is invariably disproportionate to the crime; it is an extreme sanction, suitable to the most extreme of crimes."

In dissent, Justice Brennan, the one Justice who was not in court this morning, quoted from Albert Camus: "Justice of this kind is obviously no less shocking than the crime itself, and the new 'official' murder far from offering redress for the crime committed against society, adds instead a second defilement to the first."

Retribution Questioned

Justice Marshall, in his dissent, conceded that the recent enactment of many death penalty laws had some relevance to gauging the current standards of what is "cruel and unusual." But he argued that society had other effective means of deterrence, and he disputed as well the plurality's views of retribution.

"The mere fact that the community demands the murderer's life in return for the evil he has done cannot sustain the death penalty," he said.

On the issue of the validity of broad mandatory death penalty laws, the Stewart-Powell-Stevens opinions again stressed

the history of the death penalty in the United States—but to different ends. They noted that at the start, punishment was mandatory for many offenses. Juries often acquitted defendants rather than send them to their death by a conviction.

States then began to limit the number of crimes for which death was the punishment; they later began to allow juries discretion as well even regarding those crimes.

Hence, the three Justices said, the nation had repudiated the concept of mandatory laws.

The Justices also found that both of the laws before them, North Carolina's and Louisiana's, were invalid under the 1972 ruling because they did not provide standards for the jury.

The dissenters questioned the majority's view of history. They also pointed out that in 1971 the High Court said in another death penalty case, "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."

Lives of Innocent

"It will not do to denigrate these legislative judgments as some form of vestigial savagery or as purely retributive motivation; for they are solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons," Justice White said, in a dissent joined by Justices Burger, Blackmun and Rehnquist.

Today's decision, state but which there were two.

The Georgia defendant was Troy Leon Gregg, who was convicted of the murder and robbery of two men with whom he had hitched a ride.

Under the Georgia statute, there is a "bifurcated" proceeding in which innocence or guilt is determined at a first trial and the sentence is determined at a second trial. The jury considers aggravating and mitigating circumstances and then makes a recommendation to the judge, which the judge must accept. There is an automatic review process in which the Georgia Supreme Court compares the case with others to determine whether the sentence is appropriate.

Killed Sleeping Man

In the Florida case, the defendant was Charles William Profit, who was convicted of killing a man who was asleep in bed.

The Florida statute is similar to Georgia's, except that the jury's recommendation is not binding on the judge.

In the Texas case, the defendant, Jerry Lane Jurek, was convicted of murdering a 10-year-old girl after she rebuffed his sexual advances. Then he threw her body into a river.

The Texas system is something of a hybrid. There is a hearing on sentencing in which the judge asks the jury to consider three questions: whether the defendant's action was deliberate and was committed with reasonable expectation that death would result; whether there is a "probability" that the defendant would commit criminal acts of violence that would threaten society; whether, if the victim provoked the defendant, the defendant's response was unreasonable. If the jury answers yes to all three, death is mandatory.

The Stewart-Powell-Stevens opinion reasoned that the Texas High Court's decision to provide the jury a chance to consider (mitigating) circumstances, and not just aggravating circumstances, it was constitutional.

The Louisiana case involved a man named Stanislaus Roberts, who was convicted of murder as a result of a killing of a gas station attendant in the course of robbery. The North Carolina defendant, Luby Waxton and Jerome Woodson, were also convicted after a robbery in which there was a shooting.

APPENDIX B

The tables at the end of each Supreme Court case analysis represent the interplay of the Court arguments found in that case, and also the frames ascribed by the Court reporters.

For example, taking Table 1, on the discussion of *Gregg v. Georgia*:

TABLE 3

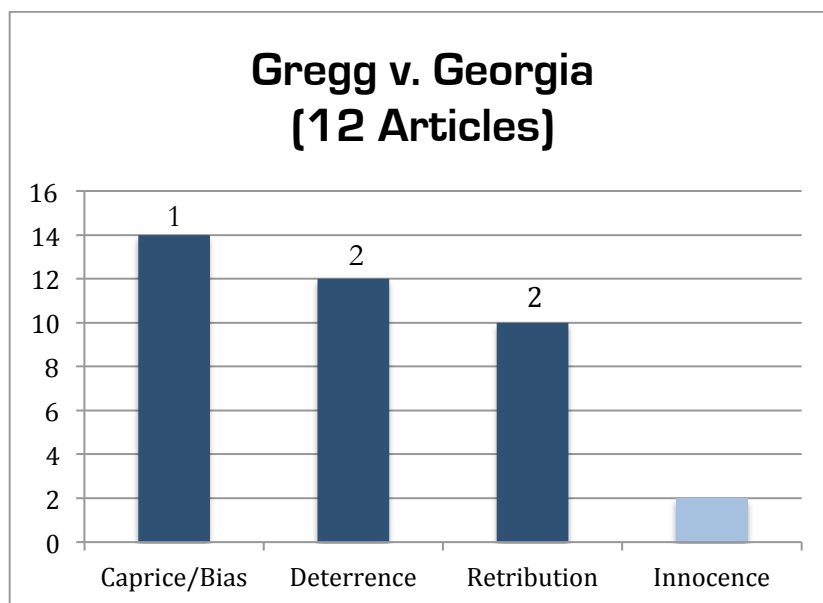
Gregg v. Georgia (1976)

Vote: 7 - 2

Decision: The new Death Penalty statutes in question are constitutional. (Ends moratorium on executions imposed by Furman)

Frames from Court Opinion:

1. Caprice/bias
2. Deterrence/Retribution
3. Desert



The left hand side of the table summarizes the Supreme Court history of the case, as well as the three strongest arguments presented in the Court.

The right hand side is a cumulative bar graph of the strongest frames identified by the press in its coverage of the relevant case. The graph is titled with the case name and then succeeded by the number of newspaper articles analyzed. The X-axis is populated by the frames identified by the newspaper articles. The Y-axis features the relative strength and expression of the frames identified.

The darker colors within each graph represents a frame/argument that is both affirmed by the Court opinion and newspaper articles. Lighter colors represent a frame that is only affirmed by newspaper articles. The numerical labels on the top of each darker bar indicate the relative importance of the argument to the Court.

The calculations for the relative strength is described below.

The strongest frame apparent in each article is weighed at three points; the second strongest at two, and the third strongest frame at one. For each case's articles, I tally up the weighed totals of the frames after having compiled and analyzed all relevant articles. For example, if the "caprice/bias" frame was found in four articles about *Gregg* to be the strongest frame, in no articles as the second strongest, and in two articles as the third strongest, then the weighed total of the caprice/bias frame in *Gregg* would be $(4(3) + 0(2) + 2(1)) = 14$. Compared to the totals of the other frames detected, the caprice/bias frame is the strongest frame in the newspaper coverage of *Gregg*.

	Frame 1 (x3)	Frame 2 (x2)	Frame 3 (x1)	Total
Caprice/bias	4	0	2	14
Deterrence	3	1	1	12
Retribution	2	2	0	10
Innocence	0	1	0	2